80-2043

Office-Supreme Court, U.S.
FILED
JUN 1 1981
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

October Term, 1981

No. ____

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26; RICHARD AHRENS, FRANK MARTIN, CHRISTINA FASULO, PATRICK HUGHES, RICHARD MELCHERS, RICHARD MICHAELS, AND LOUIS NESSIM,

Petitioners,

—against—

STEVEN A. PICO, by his next friend, FRANCES PICO; JACQUELINE GOLD, by her next friend, RONA GOLD; RUSSELL RIEGER, by his next friend, SAMUEL RIEGER; GLENN YARRIS, by his next friend, RICHARD YARRIS and PAUL SOCHINSKI, by his next friend, HENRY SOCHINSKI.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. To what extent may a school board, acting under a state statutory duty to prescribe books to be used in its schools, be prohibited under the Constitution from removing from a school library or curriculum books which it believes to be educationally inappropppriate for the school children?

2. Do secondary school students have standing under the First Amendment to sue to compel a school board to retain on library shelves or in the curriculum books considered by the board to be educationally unsuitable as a result of application of the board members' personal moral, social and political values?

3. In order for a board of education to constitutionally remove books from curriculum or a school library for content based reasons must it sustain a burden of proving such removal had a substantial and material basis and that it complied with specific objective criteria?

4. Does "political" motivation render unconstitutional otherwise permissible actions by a board of education in removing books from a school's curriculum and library?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Board of Education, Island Trees Union Free School District, et. al. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on October 2, 1980.

OPINION BELOW

The opinion of the Court of Appeals, reported in 638 F 2d 404, appears in the Appendix hereto. The opinion of the active judges of the Second Circuit Court of Appeals denying *en banc* consideration and of the three judge panel denying a rehearing, not yet reported, appears in the Appendix hereto. The opinion of the District Court, Eastern District of New York, reported in 474 F. Supp. 387 (1979) also appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on October 2, 1980. A timely petition for rehearing *en banc* was denied on March 3, 1981 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 27 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. To what extent may a school board, acting under a state statutory duty to prescribe books to be used in its schools, be prohibited under the Constitution from removing from a school library or curriculum books which it believes to be educationally inappropriate for the school children?

2. Do secondary school students have standing under the First Amendment to sue to compel a school board to retain on library shelves or in the curriculum books considered by the board to be educationally unsuitable as a result of application of the board members' personal moral, social and political values?

3. In order for a board of education to constitutionally remove books from curriculum or a school library for content based reasons must it sustain a burden of proving such removal had a substantial and material basis and that it complied with specific objective criteria?

4. Does "political" motivation render unconstitutional otherwise permissible actions by a board of education in removing books from a school's curriculum and library?

STATEMENT OF THE CASE

This is a civil rights action brought against a school board as a result of the board's removal of nine books from the school library shelves and from use in the curriculum and of the placement of one book on a restricted shelf able to be obtained with parental approval. Plaintiffs are five secondary school students who have claimed such actions to be constitutionally impermissible since they were allegedly taken "...because particular passages in the books offended their social, political and moral tastes and not because the books taken as a whole were lacking in educational value." (Par. 15 of Complaint; p. A-36 of Record). Plaintiffs have agreed by means of the filing of statements pursuant to local Rule 9 (g) that

> "Although the books themselves were excluded from use in the schools in any way, defendants have not precluded discussion about the themes of the books or the books themselves."

and

> "No teacher has been instructed not to discuss the books which were removed or to refrain from discussion or comment upon the ideas and positions they represent."

(pp. A-92 and A-93 of Record). All but one of the books contain "indecent matter, vulgarities, profanities, explicit descriptions of sexual relations, some perverted, or disparaging remarks about Blacks, Jews or Christ" (sl. op. p. 6865; 638 F. 2d 404, 419; See also excerpts, printed in footnote to dissenting opinion of Judge Mansfield, below, in 638 F. 2d 404, 419-422).

The facts are briefly: Three board members obtained excerpts of allegedly objectionable book materials while attending a conference of a conservatively oriented educational organization. Some time later two of them examined the school library card index to ascertain whether such volumes were being used by the school district. It was then ascertained that none were. Subsequently two others were discovered. (pp. 95-97 of Record).

As a result the other members of the board of education, Superintendent of Schools and principals were informed and shown the excerpts. At a board meeting it was agreed to remove the subject books from the libraries so that the board could read and review them. Subsequently and at the urging of the Superintendent a committee comprising four staff members and four community members was appointed to review the volumes in question and make recommendations concerning their educational suitability and whether they were in good taste, appropriate and relevant. (Record pp. 99-102, 114, 115, 121, 122). Neither such review nor any other form of review was required by any state statute or regulations or by the regulations of the school district.

The committee, after a series of meetings, rendered its recommendations to the board based upon the criteria referred to. The Committee voted unanimously on only two of the ten (the eleventh was unavailable) books reviewed. Two books were recommended permanently removed from the library—*Down These Mean Streets* by 5-3 and *The Naked Ape* by 6-2. There was a 4-4 split on two of the books and, after an initial 4-4 split regarding *Slaughterhouse 5* it

was recommended to be placed on a restricted list by a 5-3 vote. (Record pp. 101, 145, 146). It was recommended that *The Fixer* be restored by a 6-2 vote (Record, p. 143).

The board, having by this time read all of the books in question, at a public meeting on July 28, 1976 considered each volume separately and as a result retained one book by 7-0; retained one on a restricted basis by 6-0 with one vote to retain it unrestricted; one was removed by a bare majority of 4 votes with 2 votes to retain on a restricted basis and 1 for no restrictions; one was removed by a 5-2 vote and the balance removed by unanimous vote (Record, pp. 149-151). This action was commenced as a result.

Suit was originally commenced in the New York State Courts but since a cause of action was alleged under 42 U.S.C. §1983 the defendants removed the case to the Eastern District Court of the Second Circuit. Plaintiffs moved to remand contending in support thereof that no substantial federal question of law existed by virtue of the ruling of the Second Circuit in *Presidents Council District 25 v. Community School Board No. 25*, 457 F. 2d 289, cert. denied 409 U.S. 998 (1972). The motion was denied.

Thereafter defendants moved for summary judgment annexing to the moving papers, in addition to affidavits of the board members and Superintendent, numerous board documents and releases, member's letters and other material illuminating the issue. (Record, pp. 94-186). Plaintiffs cross moved for summary judgment. Plaintiffs' cross motion was unsupported by evidentiary materials of any kind. Plaintiffs did not refute any of the allegations contained in defendants' moving papers as is required by Rule 56 (e), F.R. Civ. P. (sl. op. p. 6071).

The District Court (Pratt, J.) granted summary judgment to defendants holding that *Presidents Council*, supra, *was* controlling and that the right of a school board to remove library books which its members found inconsistent with the basic values of the community that elected it was resolved by the statement in *Presidents Council* that a book

" '...improperly selected for whatever reason' could be removed' by the same authority which was empowered to make the selection in the first place.' " (Appendix p. 15). In so ruling Judge Pratt refused to adopt the "concept of book tenure" established by the Sixth Circuit, post *Presidents Council*, supra, and by district courts in the districts of New Hampshire and Massachusetts in *(Minarcini v. Strongsville City School District*, 541 F. 2d 577 (CA6, 1976); *Right to Read Defense Committee of Chelsea v. School Committee of the City of Chelsea*, 454 F. Supp 703 (D. Mass. 1978) and *Salvail v. Nashua Board of Education*, 469 F. Supp. 1269 (D. N.H., 1979) (Appendix p. 15). It was reasoned that for a school board to do less than choose library books (for placement *or* removal) on the basis of content would be neglect of statutory duty.

Plaintiffs appealed and in a sharply divided opinion the Second Circuit reversed and remanded for trial. Judge Sifton (sitting by designation) wrote the majority opinion with which Judge Mansfield sharply dissented contending, *inter alia* that "...the majority unjustifiably overrules our sound decisions in the indistinguishable case of [*Presidents Council*, supra] ..." (sl. op. p. 6042; 638 F. 2d 419). Both judges felt there were sufficient facts before the court, as a result of the defendants' papers supporting the motion for summary judgment and depositions of two board members, to grant summary judgment (sl. op. p. 6073, 6074; 638 F. 2d 432), and both found no distinction between the case at bar and a companion case (*Bicknell v. Vergennes Union High School Board of Directors*, 638, F. 2d 438) (argued the same day and decided the same day in which dismissal of a complaint against a school board was affirmed.) Yet the case was remanded to trial — primarily to ascertain motivation.

Defendants moved for rehearing and suggested *en banc* consideration. After many months rehearing was denied and the active Judges of the Circuit split five to five on the suggestion for *en banc* consideration effectively denying

same. Judge Mansfield dissented from such denial (with which dissent four other judges concurred) stating that "...nothing will be gained by a remand since Judge Sifton's view ... would virtually mandate a decision for the plaintiffs." (sl. op. p. 6865).

The majority opinion of Judge Sifton held that as a result of the "...unusual and irregular intervention in the school libraries operations..." perceived by him the defendants had the

> "...burden of establishing that there was a substantial and material basis for their actions and that their actions were possessed of sufficient procedural regularity [by means of application of narrowly specific criteria] to give a better basis than guesswork as to how the board of education would act in the future with regard to similar issues. (sl. op. p. 6037)."

Judge Newman, concurring in the result felt that a trial was required to determine whether defendants' actions "...*looking forward from the time they were taken* created a sufficient risk of suppressing the ideas to constitute a violation of the First Amendment" (emphasis provided) (sl. op. p. 6087; 6088; 638 F. 2d 438, See also f.n. 9) but declined to join in requiring precisely drawn rules or guidelines.

Both majority judges perceived the issue of possible political motivation in the board's decision to be essential in determining constitutional permissibility.

Neither of the majority opinions addressed the issue of the plaintiffs' standing to bring suit under the "right to know" or "right to receive" doctrine recently expanded by the Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.* (425 U.S. 748 (1976) while the dissent rejected such doctrine as "...having no application to the facts of this case." (sl. op. p. 6067; 638 F. 2d 429).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE EXTENT OF A SCHOOL BOARD'S RIGHT TO USE ITS MEMBERS VALUE SYSTEMS IN DETERMINING WHICH INSTRUCTIONAL MATERIALS TO UTILIZE.

A time honored and cherished concept is basically at issue in this case—that of local control of public education. This concept coupled with defendant board of education's deep concern with what it perceived as one method of coping with the moral crisis confronting our nation today has framed the issues before the Court. Seldom has the Court addressed the acknowledged right of a state through its local school boards to establish curricular materials and the consitutional limitations on the exercise of such right.

This right has been born of a "...recognition of the varying wants and needs of the Nation's diverse and varied communities, each with its unique character, standards and sense of social importance of a variety of values." (*Mercer v. Michigan State Board of Education*, 379 F. Supp. 580, 585, aff'd mem. 419 U.S. 1081 (1974). Although respondents claim a "pall of orthodoxy" will descend upon the nation's schools were petitioner's position to be upheld the opposite is in effect true. The essence of a local school board's responsibility is to transmit community values to those in its charge and were not the variety of these values, be they social, moral or political, not able to be transmitted by actions such as those complained of a true "pall" would set in.

The efforts of these elected school officials to meet their responsibility by means of application of their personal value standards have met with numerous challenges under the First Amendment. These challenges have attracted the attention of the Nation's media as is evidenced by this state-

ment from the Time Magazine weekly essay of January 19, 1981 captioned "The Growing Battle of the Books".

> "In fact censorship has been on the rise in the U.S. for the past ten years. Every region of the country and almost every state has felt the flaring of the censorial spirit. Efforts to ban or squelch books in public libraries and schools doubled in number, to 116 a year, in the first five years of the 1970's over the last five of the 1960's...The upsurge in book banning has not since let up, one reason being that some 200 local, state and national organizations now take part in skirmishes over the contents of books circulating under public auspices."

Similar comments have been made in The New York Times of 3/27/79 (p. B15) in an article captioned "Censorship of Textbooks is Found on Rise in Schools Around Nation" which states in its opening paragraphs

> "Parent and community groups across the country appear to have stepped up efforts to censor reading materials and course content in the public schools. The censors, in part reacting to the permissive attitudes that disturbed traditionalists in the late 1960's and early 1970's seem mainly concerned with language they consider obscene or profane, and somewhat less so with sexual or erotic material."

and in the Long Island newspaper, Newsday, of 8/3/79, in an article captioned "Censorship on the Rise" which commented on the conflict over political, family and social values in our schools, stating that "The Island Trees case has become symbolic of that clash and the accompanying debate over the rights of school boards." National and local television programs and editorials have been directed at the case at bar and similar ones.

See also The National Law Journal Vol. 3, No. 37 (5/25/81) Pg. 1. "Censorship in the Schools" See Appendix D.

As recently as May 17 the Sunday edition of the New York Times carried a lengthy front page article entitled, "Parents' Groups Purging Schools of Humanist Books and Classes' in which it was stated (p. 52)

> "Many attempts to ban books have met with failure. Others are still tied up in litigation, such as Pico v. Island Trees, a case involving a ban on Long Island in 1976 of nine books... The Long Island case is currently on appeal to the Supreme Court and could become an important test case of a school board's right to decide the contents of a school library."

Certainly, no less today than on November 6, 1972 when Mr. Justice Douglas dissented to the denial of certiorari in *Presidents Council,* are the issues raised here "crucial to our national life." (409 U.S. 998, 1000).

It is because the issues raised herein are so very crucial and because a trial of the facts under the guidelines established by the panel majority would induce an incorrect decision in the district court or, as Judge Mansfield stated, would virtually mandate a decision for plaintiffs, that defendants are compelled to file this petition. To permit the present decision to stand would, in Judge Mansfield's words (as concurred in by four other judges)

> "...require the court rather than the school board to engage in a will-o-the-wisp investigation of the board's motives and decide what reading curriculum is educationally appropriate for school children under the board's jurisdiction." (sl. op. p. 6867).

Since all decisions regarding removal of school library materials, except those governed by simple concerns of obsolescence, must be content based, future plaintiffs need only allege a political motivation to compel a full blown

trial. Such a ruling will indeed cause the federal courts to become "school board of the country" (sl. op. p. 6030; 638 F. 2d 414).

The majority has established law concerning the issues to be determined on trial which is fundamental to the further conduct of the case and which is contrary to the holdings in the Second as well as in other circuits. Judge Sifton in the majority opinion clearly places on a school board the burden of establishing that it possesses precise regulations drawn with "narrow specificity" and "sensitive tools" (sl. op. p. 6037; 638 F. 2d 417) relating to curricular and library material selection and removal. This requirement is without precendent in cases of this nature and bears a striking similarity to the requirements concerning student publication control which is a much more severe intrusion into student speech rights. In addition the majority has required that plaintiffs be given an opportunity to prove that the expressions of defendants concern over vulgarity and indecency were merely a pretext for suppression of free speech (sl. op. p. 6037; 638 F. 2d 417). Under this rule a trial could never be avoided.

Judge Newman, concurring, has not only ordered a trial of the facts and circumstances surrounding the board's decisions, but one to determine, *prospectively*, whether there was a risk of suppression of ideas and whether the board's actions "...dissuaded some members of the school community from expressing views because of the message they derived from the Board's action ... (sl. op. 6087,88 f.n. 9). Such requirements open a Pandora's Box which will greatly exacerbate the load of an already overworked federal court. The federal courts once and for all must have direction as to the scope of their right to intrude upon the decision making process of elected officials exercising statutory discretion in the selection of curricular materials for the non-adult students in their charge.

There is a striking paucity of precedent in the Supreme Court regarding the issues raised. There is little more among

the Circuits and what does exist is in irreconcilable conflict.

2. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL AND DISTRICT COURTS AS TO WHETHER ACTIONS OF THE NATURE COMPLAINED OF ARE CONSTITUTIONALLY IMPERMISSIBLE UNDER THE FIRST AMENDMENT.

Presidents Council, supra, decided in the Second Circuit in 1972 was a case of first impression. The next circuit addressing these issues was the Sixth in 1976 which held in *Minarcini*, supra, that a board of education had a right as a result of what were obviously personal social, political and moral values to decide not to approve or purchase Joseph Heller's *Catch 22* or Kurt Vonnegut's *God Bless You, Mr. Rosewater* as textbooks or library books. But, in its own "Catch 22" the court in the same breath also held that *Catch 22* could not be removed from a library shelf for reasons "...related solely to the social or political tastes of school board members." (at p. 582).

Although the Second Circuit had stated in *Presidents Council* (p. 293) that

> "this concept of a book acquiring tenure by shelving is indeed novel and unsupportable under any theory of constitutional law we can discover."

and further that

> "it would seem clear to us that books which become obsolete or irrelevant or where improperly selected, initially, for whatever reason, can be removed by the same authority which was empowered to make the selection in the first place."

the Sixth Circuit stated (p. 581)

> "We do not read the Second Circuit opinion so broadly [as the lower court had] ... If it were unqualified, we would not follow it."

In addition to attempting to distinguish the clear language of *Presidents Council*, the *Minarcini* court held that the student plaintiffs possessed a First Amendment "right to know" under a line of Supreme Court cases culminating with *Virginia State Board of Pharmacy*, supra, recognizing, however, that such concept was "...somewhat more difficult ...than a direct restraint on speech." (at p. 583). Accordingly the plaintiffs were held to have standing to raise the First Amendment issue although no publishers, authors or teachers had joined.

Although the author of "Right to Know" (Case Western Reserve L. Rev. 27:1034 (1977) was able to make a vague distinction between the two cases stating (p. 1053) that they were "...not necessarily irreconcilable." He also called *Minarcini* "a unique decision" (p. 1036) supported by "...no clear line of authority..." (p. 1034) which was vague and left much to inference.

The next case involving similar issues before a Court of Appeals was *Cary v. Board of Education*, 598 F. 2d 535 (Tenth Circuit, 1979) wherein senior high school teachers sought a declaration that their First Amendment rights were violated when the board of education banned ten books from a list of 1,285 for use in their language arts classes. The board overruled the recommendations of a selection committee and directed that the books not be purchased or assigned, nor was credit to be given students for reading them. The parties stipulated that the books were not obscene, that their use could be deemed proper for language arts classes, that teachers could be dismissed for assigning, giving credit for or discussing them at length but that there was no systematic effort to exclude a particular system of

thought or philosophy.

The court considered a remand to ascertain whether the board's reasons were constitutionally permissible but after commenting that curriculum should properly reflect the value system of the taxpayers, held that

> "...the board was acting within its rights in omitting the books, *even though the decision was a political one, influenced by the personal views of the members.*" (at p. 544.) emphasis provided)

The *Cary* court commented on the limited number of times the Supreme Court had addressed the issue of prohibition of what may be contained in school curricula citing *Meyer v. Nebraska,* 262 U.S. 390 (1923); *Bartels v. Iowa,* 262 U.S. 404 (1923); *Epperson v. Arkansas* 393 U.S. 97 (1968); *Mercer* (supra) and *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943), none of which directly concerned issues such as that at bar herein.

The most recent appellate decision, aside from those in the Second Circuit, is from the Seventh Circuit (*Zykan v. Warsaw Community School Corporation,* 631 F. 2d 1300 (1980) where a student plaintiff's amended complaint alleged that a board of education ordered the removal and destruction of a text; an English teacher was told to return one book to a publisher and to not use three others; a policy was promulgated prohibiting the use of "objectionable" reading matter; "Go Ask Alice" was permanently removed from the school library; seven courses were eliminated and one teacher was not rehired. It was alleged that the books were banned because "...particular words in the books offended their [defendants'] social, political and moral tastes and not because the books taken as a whole were lacking in educational value." (at p. 1302)

Addressing the basic role of secondary schools the Seventh Circuit reaffirmed a "...broad formative role encompassing the encouragement and nurturing of those

fundamental social, political and moral values that will permit a student to take his place in the community." (at p. 1304). It concluded that "...it is in general permissible and appropriate for local boards to make educational decisions based upon their personal social, political and moral views. (Citing *Cary*, supra, at p. 1305)

In ruling on the removal of the library book the Seventh Circuit held that such allegation was not constitutionally actionable since the complaint "...*only* recites the aforementioned phrase regarding defendants reliance on their personal moral, political and social judgment in removing the book." (at p. 1308) (emphasis provided). In so holding the court cited *Minarcini, Salvail* and *Right to Read Defense Committee* (supra) while remarking that

> "...there is substantial authority on the other side [citing cases including *Presidents Council*, supra, and the district court decisions in the case at bar and in its companion case before the Court of Appeals] and we join with these courts in rejecting the suggestion that a particular book can gain a kind of tenure on the shelf merely because the administrators voice some objections to its contents. (at p. 1308)"

Although the Seventh Circuit remanded it did so only to provide plaintiffs with an opportunity to amend their complaint.[1]

Subsequent to *Minarcini*, supra, and prior to *Cary* and *Zykan*, supra, the District Courts of Massachusetts and New Hampshire spoke to similar issues in *Right to Read Defense Committee*, supra, and *Salvail*, supra. In the former, an obviously vulgar poem was responsible for the barring of an

[1] In its decision the court acknowledged the existence of a "qualified 'freedom to hear' that has lately emerged as a constitutional concept." (citing *Virginia Pharmacy Board*, supra) (at p. 1304).

anthology from the school library. Citing *Minarcini* the court adopted its concept of greater rights for a book once shelved and enjoined the board's ban. In so doing it acknowledged the plaintiff students' "right to read" as "...a valuable right subject to First Amendment protection" (at p. 714). The latter case involved the removal of "Ms" magazine from a school library which action the court enjoined. The court cited *Minarcini* in distinguishing *Presidents Council* and cited the subsequent decision of the Supreme Court in *Virginia Board of Pharmacy* as further distinction. Following a trial the court concluded that it was the 'political' content of the magazine rather than its sexual overtones that led to its removal stating (at p. 1274) that "Such a basis for removal of the publication is constitutionally impermissible."

In short there is a clear and irreconcilable conflict among the circuits over whether a book on a shelf has greater rights than when off, whether personal value systems of a board member may be utilized in making curriculum decisions, whether the possibility that the underlying reason is the "political" views of the board members taints their actions constitutionally and whether an infant student has standing under *Virginia Pharmacy Board* to raise these issues initially.

3. THERE IS SERIOUS CONFLICT WITHIN THE SECOND CIRCUIT REGARDING THE ISSUES RAISED HEREIN.

Not only is there an inter circuit conflict on these crucial issues, but there appears to be one within the Second Circuit as is most apparent from a reading of *Presidents Council* together with the case at bar and its com nion, *Bicknell.* This conflict is readily apparent from a reading of the dissent as well as the *en banc* opinions. In *Bicknell* the complaint against the board was dismissed although plaintiffs complained the board was motivated solely by its members personal tastes and values and had violated its own guide-

lines. The court rejected plaintiffs' due process theory as "without merit" and held that book removal for reasons of vulgarity or indecency was constitutionally permissible. The writer of the majority opinion distinguished the case at bar on the basis of there having been no complaint of political motivation or suppression of ideas. Judge Newman, in concurring in the denial of re-hearing *en banc* states as his reason the need for a trial before articulating a "...standard for determining when politically motivated book removal violates the First Amendment..." (sl. op. p. 6863)

The implication is that political motivation would be impermissible, yet that is not what has been held in *Cary* or in *Zykan,* supra. They clearly state that political motivation is no less permissible than social or moral motivation.

Yet Judge Sifton writing for the majority in the case at bar citing the "unusual and irregular intervention" and "irregular circumstances" shifts the burden of proof to defendants and requires that they prove the application of objective criteria with "narrow specificity" and the existence of "procedural regularity." This is the very due process requirement the same court in *Bicknell* held to be "without merit."

This same court in *Presidents Council* has stated that a book "...improperly selected, for whatever reason..." may be removed by the same authority empowered to select it" (at p. 293) and that before a claim will lie there must be a "sharp and direct" intrusion on constitutional rights, "totally distinct" from those then in issue. (at p. 292.) There are factual distinctions among the cases, but no differences in principle and they are certainly not "totally distinct" from each other.

4. THE DECISION OF THE COURT BELOW IS ERRONEOUS.

Justice Black in his concurrance in *Epperson v. Arkansas,* (supra, p. 97) stated

> "...there is no reason I can imagine why a State is without power to withdraw from its curriculum any subject deemed too emotional and controversial for its public schools... I am also not ready to hold that a person hired to teach school children takes with him into the classroom a constitutional right to teach sociological, economic, political or religious subjects that the school's managers do not want discussed."

and Justice Stewart, also concurring, stated (at p. 115) that "The States are most assuredly free 'to choose their own curriculums for their own schools.' "

Two of the three judges of the panel herein attest to having sufficient facts before them to enable summary judgment to be rendered (albeit in one instance, for the defendants, and in the other for the plaintiffs). Two find no distinction with the companion case (*Bicknell)* in which the court affirmed the granting of defendants motion to dismiss. Judge Mansfield, dissenting and in addition to accusing the majority of taking "some liberties with the record, substituting suspicions for undisputed evidence." (sl. op. p. 6043; 638 F. 2d 419), describing the majority reasons as "curious, vague and unsupported by the record" (sl. op. p. 6067; 638 F. 2d 429) and contending that the "panel majority's solicitude stretches the constitution beyond the breaking point" (sl. op. p. 6867), stated that "...the Board acted carefully, conscientiously and responsibly after according due process to all concerned" (sl. op. p. 6050; 638 F. 2d 422) and that "...the Board acted on rational and specific grounds relevant to the education and welfare of the school children ...fairly and conscientiously." (sl. op. p. 6063; 638 F. 2d 427).

Plaintiffs sole allegation in the complaint herein regarding

motivation was that "...particular passages offended [the board's] social, political and moral tastes..." (Record, p. A-36) The sole document appended to either the complaint or the cross motion for summary judgment by plaintiffs was a press release by the board (Record, pp. A-40, 41) wherein concern was expressed about the books being "...offensive to Christians, Jews, Blacks and Americans in general..." and containing "...obscenities, blasphemies, brutality and perversion beyond description." Nothing that could in any way be deemed political motivation or suppression of ideas appeared in that document.

Plaintiffs agreed in their statement under local rule 9-g that the themes of the books and the books themselves could be discussed in class and that no teacher was instructed to refrain from commenting upon the books or their themes. Plaintiffs did not refute any of defendants' lengthy materials in support of their motion as required by Rule 56 (e), F.R. Civ. P. In none of the plaintiffs' papers was suppression of ideas alleged or hinted at. Five of the sitting judges in the Second Circuit stress that "The record is undisputed that students and teachers remain free to discuss the ideas in the books, free of the indecencies and vulgarities." (sl. op. p. 6866).

Yet Judge Sifton (sitting by designation) writing for the majority has seized upon the fact that the board and the teacher union as well as the Superintendent were at odds on the issue, that the initial concern resulted from attendance by some members at a conference sponsored by a conservative education organization and that the Board failed to follow all recommendations of an advisory committee it appointed (but didn't have to) to imply procedural irregularity. It is this "procedural irregularity" which, in the eyes of Judge Sifton, when coupled with "...evidence that the decisions made were based on defendants' moral or political beliefs", infers sufficient attempt to establish official orthodoxy to create a *prima facie* case. (sl. op. 6038; 638 F. 2d). Far from being unique and irregular, the board's reliance upon second party

sources for its initial information concerning potentially unsuitable materials is a common and customary method of acquiring information. It must rely on various sources for input regarding suitability of curricular materials and still does so.

The very procedural regularity required as necessary by Judge Sifton is, however, rejected as not required by Judge Newman who concurred in the result. Judge Newman's major concern appears to be with "political motivation" and it is that possibility which is his justification for a trial. He appears to reject the lesson of *Epperson, Cary* and *Zykan,* supra, that political values not only do not taint governmental action of the kind in question, but are essential to the transmission of community values.

If a trial is compelled it will not only be lengthy and complex under the guidelines established by the majority but it will be a classic example of the very intrusion of "...the judiciary into the internal affairs of the school." abjured by the court in *Presidents Council* (p. 292).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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Babylon, New York 11702
GEORGE W. LIPP, JR.
Counsel for Petitioner

May 20, 1981

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 619—September Term, 1979

(Argued February 6, 1980 Decided October 2, 1980)

Docket No. 79-7690

STEVEN A. PICO, by his next friend, Frances Pico, JACQUELINE GOLD, by her next friend, Rona Gold, RUSSELL RIEGER, by his next friend, Samuel Rieger, GLENN YARRIS, by his next friend, Richard Yarris, and PAUL SOCHINSKI, by his next friend, Henry Sochinski,

Plaintiffs-Appellants,

—against—

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26, RICHARD AHRENS, FRANK MARTIN, CHRISTINA FASULO, PATRICK HUGHES, RICHARD MELCHERS, RICHARD MICHAELS, and LOUIS NESSIM,

Defendants-Appellees.

Before:

MANSFIELD and NEWMAN, *Circuit Judges*, and SIFTON, *District Judge*.*

* Of the Eastern District of New York, sitting by designation.

This appeal is from a judgment entered in the United States District Court for the Eastern District of New York, George C. Pratt, Judge, which granted the motion of defendants-appellees for summary judgment, denied the motion of plaintiffs-appellants for similar relief and for a class action determination, and dismissed the complaint which sought declaratory and injunctive relief on constitutional grounds with respect to the removal by defendant-appellee Board of Education of certain books from the school libraries and curriculum of the Island Trees Union Free School District.

Reversed and remanded for trial.

ALAN H. LEVINE, Clark, Wulf, Levine & Peratis, New York, N.Y., ALAN AZZARA, Nassau County Chapter New York Civil Liberties Union, Mineola, N.Y., ARTHUR EISENBERG, RICHARD EMERY, New York Civil Liberties Union, New York, N.Y., and STEVEN HYMAN, Hyman & Miner, New York, N.Y., *for Plaintiffs-Appellants*

GEORGE W. LIPP, JR., Lipp & Rubin, Babylon, N.Y., *for Defendants-Appellees*

CAHILL, GORDON & REINDEL, New York, N.Y. (Floyd Abrams and Roy L. Regozin, of counsel) for National Council of Teachers of English, New York State English Council, National Council for the Social Studies, and Speech Communication Association as *Amici Curiae*

REUBEN & PROCTOR, Chicago, Illinois (William D. North, of counsel) for the American Library Association and the New York Library Association as *Amici Curiae*

BREDHOFF, GOTTESMAN, COHEN & WEINBERG, Washington, D.C. (Robert M. Weinberg, Gary L. Sasso and Michael H. Gottesman, of counsel), and DAVID RUBIN, Washington, D.C. for National Education Association as *Amicus Curiae*

IRWIN KARP, New York, N.Y. for The Authors League of America, Inc. as *Amicus Curiae*

JAMES R. SANDNER, New York, N.Y. (Elizabeth A. Truly, Jeffrey S. Karp, of counsel) for New York State United Teachers as *Amicus Curiae*

HENRY R. KAUFMAN, New York, N.Y. (Ira M. Millstein, R. Bruce Rich, Amy L. Katz and Weil, Gotshal & Manges, of counsel) for Association of American Publishers, Inc., P.E.N. American Center, Writers Guild of America, East, Inc. and Writers in the Public Interest as *Amici Curiae*

NATHAN Z. DERSHOWITZ and EDWARD LABATON, New York, N.Y. (Victoria Eiger and Maureen Schild, of counsel) for The American Jewish Congress, The American Jewish Committee, The Anti-Defamation League of B'nai Brith, The

American Orthopsychiatric Association, The Ethical Humanist Society of Long Island, The Long Island Council of Churches, The National Council of Jewish Women and the Unitarian Universalist Association as *Amici Curiae*

IVAN B. GLUCKMAN for National Association for Secondary School Principals as *Amicus Curiae*

SIFTON, *District Judge.*

This appeal arises from a judgment entered in the United States District Court for the Eastern District of New York granting defendants' application for summary judgment and dismissing plaintiffs' class action complaint which sought injunctive and declaratory relief with respect to alleged violations of the first amendment to the United States Constitution and Article 1, Section 8 of the New York State Constitution.[1] These violations were alleged in the complaint to have arisen as a result of defendant School Board's removal of three works of fiction, four autobiographies, two anthologies, and one work of non-fiction, from the school libraries and curriculum of the Island Trees Union Free School District on Long Island.[2] Since the

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1 The complaint was originally filed in state court and was thereafter removed to federal district court pursuant to 28 U.S.C. 1441. Plaintiffs' motion to remand to the state court was denied, a ruling not complained of here and which was, in all events, correct, since the complaint raised substantial issues which the federal court had jurisdiction to decide under 28 U.S.C. 1343. *See* 28 U.S.C. 1441(b).

2 The books at issue are: *The Fixer*, by Bernard Malamud; *Slaughterhouse Five*, by Kurt Vonnegut; *The Naked Ape*, by

majority of the panel concludes that defendants were not entitled to judgment as a matter of law, we reverse the judgment below. Because the majority is not in agreement as to whether the present record is sufficient to entitle plaintiffs to judgment in their favor, we remand for a trial to develop a plenary record on which that issue may be determined.

FACTUAL BACKGROUND

On September 19, 20 and 21, 1975, three members of the Board of Education of the Island Trees Union Free School District[3] in Nassau County, including defendants Frank Martin, Patrick Hughes and the Board's President, defendant Richard Ahrens, attended a conference in Watkins Glen, New York, sponsored by an organization called People of New York United, an organization described by defendant Ahrens below as "a conservative organization . . . composed of parents concerned about education legislation in this State." Attending the conference, besides the three defendants, were among others, according to Ahrens,

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Desmond Morris; *Down These Mean Streets*, by Piri Thomas; *Best Short Stories by Negro Writers*, edited by Langston Hughes; *Go Ask Alice*, by an anonymous author; *A Hero Ain't Nothing But a Sandwich*, by Alice Childress; *Black Boy*, by Richard Wright; *Laughing Boy*, by Oliver LaFarge; *Soul on Ice*, by Eldridge Cleaver; and an anthology entitled, *A Reader for Writers*, edited by Jerome Archer.

3 Union Free School Districts are the product of New York State's first attempt in 1853 to encourage rural school districts to consolidate resources in an effort to enrich elementary education and make possible secondary school facilities not otherwise available to the separate communities. L. 1853, c. 433. Graves, "Development of the Education Law in New York," McKinney's Education Law, Sections 1 to 600, pp. xxi-xxii (1969 Ed.).

> " . . . an attorney from Washington, D.C. who represented the Heritage Foundation, a conservatively oriented organization, George Archibald, a legislative assistant to Rep. John Conlon of Arizona, and other speakers with reputations in education circles who spoke about current topics about which the conservative community was concerned including litigation involving the control of text books and library books in the schools. The speaker on this topic was a Mr. Fike from Kanawa County, West Virginia which had undergone such litigation."

At the conference, according to Ahrens, defendants obtained "lists of books considered objectionable by some persons together with excerpts from them containing the more objectionable material." These "lists" consisted, at least in part, of two sets of crudely typed and reproduced sheets, one relating to a Randolph High School in Randolph, New York, the other, to an inspection in March of 1975 by an organization called Concerned Citizens and Taxpayers for Decent School Books of Baton Rouge, Louisiana of the card catalogue and shelves of the Tara High School library in an unidentified town in that State. The lists included titles, authors and quotations, with page references. Interspersed with the quotations, themselves presented with editorial underlining, were comments of which the following are a sample:

> "Title: *Soul on Ice* by Eldridge Cleaver (Leader of Black panther [sic] and not allowed to live in America.)"

> "THIS BOOK WAS RETAINED FOR SENIORS ONLY IN RANDOLPH. THE BOOK IS FULL OF

ANTI-AMERICAN MATERIAL AND HATE FOR WHITE WOMEN. WHY WOULD TEACHERS WANT HIGH SCHOOL STUDENTS TO READ THIS???? OUR GROUP IS GOING TO FILE A COMPLAINT AGAINST THIS BOOK ON SEDITIOUS AND DISLOYAL MATTER."

* * * * *

"TITLE: *Go Ask Alice* by *Anonymous.* (*Suppose* to be diary of 15 year old girl)"

"NOTE: This book, after being reviewed by three teachers was retained. Parents, do not be fooled by the movie version of this book. It reads a lot different. If teachers cannot find a better book than this to illustrate drugs are bad then what are we paying them for. They justify their viewpoint because the girl dies in the end. A lot of teachers think this is a great book????????"

"[Handwritten] LEGISLATORS: KEEP MORATORIUM ON SEX ED! PROVIDE CRIMINAL PENALTIES SO D.A.'S CAN PROSECUTE VIOLATORS! PROTECT THE CHILDREN."

* * * * *

"1. *Our Sexual Evolution* by Helen Colton—This library book displayed in the Tara High School Library appears to be in violation of Act 500 of the Louisiana legislature. It belittles parents, presents no moral judgments, is anti-Christian and contrary to laws of God. It has chapters on Group Marriage, Communes, Abortion, Contraceptives etc. It also promotes women's lib. It costs $5.95 of our tax dollars."

"2. *A Reader for Writers—A Critical Anthology of Prose Readings* by Jerome W. Archer—This book was used in advanced composition class at Tara High School. It equates Malcolm X, considered by many to be a traitor to this country, with the founding fathers of our country."

The excerpts themselves, in contrast to the more politically oriented comments quoted above, are devoted principally to quotations of vulgar and indecent language referring to sexual and other bodily functions and crude descriptions of sexual behavior, although the manner of excerpting, including the use of underlining, elisions, apparent errors, and interspersed editorial comment leaves no great sense of confidence in the literal accuracy of the quotations. Several books appear on the list without any excerpts at all, but simply with a critical appraisal, *e.g., A Reader for Writers.* Another is listed without comment next to what purports to be quotations from three of the book's pages.[4]

Although acquired in September, nothing was done by defendants with these lists[5] until November 7,

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4 The entry for Oliver LaFarge's *Laughing Boy* reads in its entirety as follows:

"*Laughing Boy* by Oliver LaFarge
Page 38—'I tell you, she is all bad; for two bits she will do the worst thing.'
"Pages 258-9—'I was frightened when he wanted me to lie with him, but he made me feel all right. He knew all about how to make women forget themselves, that man.'"

5 An affidavit of defendant Martin states he made a second list entitled "Objectionable Books" from the materials acquired at the conference. Since this list includes titles and authors beyond those covered by the lists identified as acquired at the Watkins Glen conference, e.g., *Why I am not a Christian,* by Bertrand Russell; *Law and the Consumer;* and *Down These Mean Streets,* by Richard Yates [sic], it seems clear either that lists were obtained at the Watkins

1975, when defendants Martin and Ahrens attended "Winter School Night" at the District's senior high school. According to Ahrens and Martin, they asked a school custodian to let them into the school library and, by comparing Martin's lists of objectionable books with the library card index files, determined that nine "objectionable" texts were in the school library. The school's principal apparently interrupted their work. According to Ahrens, the two men "told him briefly what we were doing."

Nothing more was done about the matter thereafter until late February 1976[6] when, at a regular meeting of the Board, according to Ahrens,

> " . . . we asked the two high school principals to stay after the meeting which they did. We had a lengthy discussion with them . . . during which there was much concern and wringing of hands over the potential of the situation. One principal, after reading the excerpts said 'If this stuff is in the books they don't belong in the school.' We had not at that time checked the junior high school library so we asked that principal to check it (he did so and found two more books that were on Mr. Martin's list)."

As a result of this informal meeting, the Board directed the principals of the schools to remove the books from the library shelves forthwith.

Glen conference which are not part of the record, or that other sources were consulted by Martin.

6 According to Ahrens, "I think we mentioned our concerns to the other board members and to the [District] Superintendent in a rather informal manner" at an executive session of the Board in November. The Board also met in January.

Three days later the Superintendent of the School District,[7] Richard Morrow, sent a memorandum to the Board which had as its subject, "List of Books to be Banned." The memorandum stated, *inter alia*:

> "My objection to direct action banning all the books on the list purchased [sic] at Watkins Glen is that we don't know who developed the list, nor the criteria they used. I don't believe we should accept and act on someone else's list, unless we first study the books ourselves.
>
> ". . . [W]e already have a policy . . . designed expressly to handle such problems. It calls for the Superintendent, upon receiving an objection to a book or books, to appoint a committee to study them and make recommendations. I feel it is a good policy—and it is Board policy—and that it should be followed in this instance. Furthermore, I think it can be followed quietly and in such a way as to reduce, perhaps avoid, the public furor which has always attended such issues in the past.

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7 Superintendents of Union Free School Districts possess the following powers, among others, under New York Education Law 1711(5):

> "a. To be the chief executive officer of the school district and the educational system, and to have the right to speak on all matters before the board, but not to vote.
>
> * * * * *
>
> "c. To prepare the content of each course of study authorized by the board of education. . . .
>
> "d. To recommend suitable lists of textbooks to be used in the schools.
>
> * * * * *
>
> "f. To have supervision and direction over . . . all other matters pertaining to . . . libraries, lectures, and all other education activities under the management, direction and control of the board of education."

". . . I have no doubt (but of course no proof) that such a local committee would end up agreeing about most of the books on the list. The Board's feelings on them are not so different from the staff's and parents'—after all, that is shown by the fact that the large majority of the books listed are not and apparently never have been recommended and used by the staff.

". . . [U]nilateral banning by the Board, without inputs from the staff, would surely create a furious uproar—not only in the staff, but across the community, Long Island and the state. I don't believe you want such an uproar, and I certainly don't."

The Superintendent further reported that one of the books directed to be removed from the library, Malamud's *The Fixer,* was being used as part of a senior course in literature, having been "approved as part of that course in January, 1972, by the Board of Education."

Morrow's memorandum of February 27, 1976, was answered by a memorandum of March 3 from defendant Ahrens directing again that "*all copies* of the library books in question" (emphasis in the original) be removed immediately from the libraries.

Shortly thereafter, as Superintendent Morrow had predicted in his memorandum, the Board's action became known, and newspaper articles concerning the events began to appear in the New York press. Defendants responded to these articles by means of a press conference at which a release was distributed which read in part as follows:

"It comes as no surprise to this Board of Education that it is once again the subject of attack by Teacher Union leaders, headed by Walter Compare. With the election of School Board candidates just two months away, the Teachers' Union is once again attempting to discredit the Board and win the seats for two union-backed lackeys."

Referring to the Watkins Glen conference, the press release continued:

"While at the conference, we learned of books found in schools throughout the country which were anti-American, anti-Christian, anti-Semetic [sic], and just plain filthy. Upon their return, Ahrens & Martin in early November went to the Senior High School Library to check the card catalog to see if any of these objectionable books were in our library. We discovered nine such books. We neither removed books, nor cards from the card file.

"At the next meeting of the Board, the entire Board discussed how to handle this situation, realizing that to make the titles of the books public might cause a sudden run on the library by the students.

* * * * *

"To date, what we have found is that the books do, in fact, contain material which is offensive to Christians, Jews, Blacks, and Americans in general. In addition, these books contain obscenities, blasphemies, brutality, and perversion beyond description.

* * * * *

> "We are sure that when most of our teachers are given the opportunity to review the material, they will side with the Board, and against the Executive Committee of their own union. When most of the parents review these books, we are confident they will back us to the hilt, grateful that we have done our job and remained as they elected us . . . their faithful Watchdogs."

Also during the month of March, the Board released an issue of its regular *Newsletter* to the residents of the school District stating, "[t]he entire contents of this special newsletter will be devoted to the library book issue" and asking the people of the District to attend the Board meeting of March 30, 1976, where "[y]ou will have the opportunity to examine the books yourselves." The *Newsletter,* after again attributing the newspaper stories concerning the issue to "lies and misinformation which has been spread by the teachers' union," stated:

> "Mr. Compare is fighting to keep books in our schools which are offensive to Christians, Jews, Blacks, and all Americans in general. One such book [apparently referring to Vonnegut's *Slaughterhouse Five*] refers to Jesus Christ as a 'man with no connections.' One must ask oneself what motivates this man? . . . Why . . . does Mr. Compare insist that these books remain in the hands of our children."

In this atmosphere the Board held a public meeting on the subject on March 30, 1976. At this meeting Superintendent Morrow again stated his position in a prepared statement that it was "wrong for the Board—or any other single group—to act to remove books

without prolonged prior consideration of the views of both the parents whose children read these books, and the teachers who use these books to instruct;" that it was "wrong to judge any book on the basis of brief excerpts from it [since m]any books—among them widely acclaimed classics—contain brief passages which, if taken out of context, would seem to condemn them;" that it was "wrong to take action based on a list prepared by someone outside the Island Trees community;" and that "it was wrong to by-pass the established procedure for reviewing the challenged books." Further, Morrow recommended that, pending review by a committee, "the challenged books be returned to the shelves, with the understanding that every parent has the right and the responsibility to supervise the materials his child reads." Instead, the Board ratified its earlier action removing the books, but directed that a committee of eight, composed of four school staff members and four parents, "read . . . and make recommendations to the board" concerning "the educational suitability of these books and whether they are in good taste, appropriate and relevant." This latter language was taken from a provision of the union's contract with the Board which provided:

> "Accordingly, it is agreed that teachers shall have the right to introduce and explore controversial material, provided only that the material and manner in which it is presented are in good taste, appropriate to grade level, and relevant to course content. Every effort will be made to present all sides of controversial issues."[8]

[8] Apparently, in March the union had filed a grievance against the Board stating that the Board had violated this clause of the union contract.

Coincidentally, the Board fixed May 26, 1976, as the late for the election of new Board members and directed that nominating petitions be filed by April 26, 1976.

On April 2, 1976, the Superintendent in a memorandum to the Board again urged that, pending review by the committee to be appointed, the books be returned to the library since the reason for their removal had been satisfied. The books were, however, not returned. On April 6, 1976, a book review committee was selected by the Board and the Superintendent. On April 30, 1976, the committee met, having apparently read some of the books.

> "After a very comprehensive discussion regarding the book *THE FIXER* by Bernard Malamud, the vote to return the book to our modern literature curriculum was: 6 YES and 2 NO. It was further recommended that the book would be returned subject to parental approval."[9]

A second meeting of the committee on May 12, 1976, led to a memorandum from the committee to defendant Ahrens inquiring with respect to the two anthologies, *Best Short Stories by Negro Writers* and *A Reader for Writers*, "whether you object to specific stories or the entire book." There is nothing in the record to indicate whether this inquiry was ever answered and some indication that it was not. At this meeting the committee also voted unanimously that Oliver

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9 Neither this recommendation nor any of the other recommendations made by formal vote of the committee at later meetings in May and June were acted upon prior to the July Board of Education meeting when all of the committee's recommendations were considered together.

LaFarge's *Laughing Boy* be returned to the library and by a vote of 5 to 3 that *Slaughterhouse Five* be returned to a restricted shelf in the library. At meetings of May 26, June 16, and June 30, 1976, the committee voted to return *Black Boy, Go Ask Alice,* and *Best Short Stories by Negro Writers* to the shelves. It voted not to restore *The Naked Ape, Down These Mean Streets,* and *Soul on Ice.* The committee reported itself unable to make a recommendation with regard to *A Reader for Writers* since "[t]his book seems to be unavailable in this area."

Following the committee's report to the Board on July 1, 1976, the Board met again publicly on July 28, 1976, and took up what the minutes describe as the "Book Issue," voting separately on each of the books covered by the committee's recommendations. As a result of these separate votes, only *Laughing Boy* and *Black Boy* were returned to the library shelves generally. The other books at issue were directed to be "removed [sic] from elementary and secondary libraries, and for use in the curriculum."

At the same time as the book committee was considering each book, two of the incumbent members of the Board of Education ran again for office. According to defendant Ahrens, the "book banning issue was the major one in the campaign. Nevertheless (or more probably because of this) the incumbent members were re-elected."

A further press release defending the Board's position was issued by defendant Ahrens in August 1976. In January 1977 this lawsuit was filed. The Board responded to the lawsuit with a press release stressing the repellent and vulgar language present in the books. Counsel for defendants, in a procedure of questionable

propriety,[10] mailed a questionnaire to 4,979 mailing addresses in the District asking whether the recipient was a parent of public school children and whether the recipient "supported" the Board's action in removing "the books in question." The results of this mailing, "done at our attorney's request due to the alleged class action nature of the suit," but reported in defendants' response to plaintiffs' motion for summary judgment, were 508 (or 59% of those responding) supporting the Board, 358 (or 41% of those responding) opposed.

Following denial of plaintiffs' motion to remand the case to state court, defendants moved for summary judgment dismissing plaintiffs' complaint. In support of their motion defendants set forth the history and documents referred to above. In addition, they alleged:

> "Defendants Ahrens and Martin objected to the books for numerous reasons including the presence of profanities and obscenities, explicit sexual allusions, depictions of deviant sex, the glorification of sex and drugs, ungrammatical usage, and excerpts offensive to racial, religious or ethnic groups."

The two defendants identified the offending essay in *A Reader for Writers*, not as the essay which equated Malcom X with the Founding Fathers, but rather, as Swift's "A Modest Proposal." Defendant Ahrens found

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10 *Manual for Complex Litigation*, Sec. 1.41 (1973). *Compare AAMCO Automatic Transmissions, Inc. v. Tayloe*, 67 F.R.D. 440, 447 (E.D. Pa. 1975) *and Weight Watchers of Philadelphia v. Weight Watchers International*, 53 F.R.D. 647 (E.D.N.Y. 1971) *with Matarazzo v. Friendly Ice Cream Corp.*, 62 F.R.D. 65 (E.D.N.Y. 1974). *Cf. Coles v. Marsh*, 560 F.2d 186 (3d Cir.), *cert. denied*, 434 U.S. 985 (1977). And *see Erhardt v. Prudential Group, Inc.*, ___ F.2d ___ (2d Cir. Sept. 11, 1980).

the subject of that 18th Century satire on England's treatment of Ireland "irrelevant to the curriculum." Defendant Martin averred that he "felt it to be inappropriate"—apparently referring to the standard of appropriateness of grade level contained in the union contract. Plaintiffs sought depositions of defendants and then themselves cross-moved for summary judgment. On August 2, 1979, Judge Pratt, relying principally on the decision of this Court in *President's Council, District 25 v. Community School Board #25*, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972), granted the motion of defendants for summary judgment in their favor.

DISCUSSION

I

We start with an awareness that the application of the prohibitions of the first amendment to secondary school education presents complexities not encountered in other areas of government activity. We are dealing with the care of children by a government concerned with the "well-being of its youth." *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 749 (1978), *quoting Ginsberg v. New York*, 390 U.S. 629, 640 (1968). Moreover, "a principal function of all elementary and secondary education is indoctrinative—whether it be to teach the ABC's or multiplication tables or to transmit the basic values of the community." *James v. Board of Education*, 461 F.2d 566, 573 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972). Further, "[b]y and large, public education in our Nation is committed to the control of state and local authorities." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). Finally, we must accommodate

"our concern for the First Amendment rights of students with a cautious deference to the expertise of educational officials within the academic environment." *Thomas v. Board of Education*, 607 F.2d 1043, 1050 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 1034 (1980).

At the same time, "First Amendment rights, applied in the light of the special characteristics of the school environment, are available to teachers and students." *Tinker v. Des Moines School District*, 393 U.S. 503, 506 (1969). Moreover, "[t]he Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637 (1943). As Justice Jackson also wrote in the same decision, "[p]robably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational school officials may compel youth to unite in embracing. . . . [T]he First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings." *Id.* at 641. With respect to the relative expertise of courts and educational officials, the same opinion reminds us, "we act in these matters not by the authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed." *Id.* at 640.

It is, however, not only the unusual number of potentially conflicting values which compete for attention in matters relating to secondary education that makes these cases difficult. There is, in addition, the

generally acknowledged proposition that "freedom of expression demands breathing room." *James v. Board of Education, supra,* 461 F.2d at 572. That conclusion, based on an awareness of the "chilling effect upon the exercise of vital First Amendment rights," *Keyishian v. Board of Regents,* 385 U.S. 589, 604 (1967), of determinations, whether by school officials or by courts, which attempt with either excessive breadth or excessive precision to delimit the areas of protected and prohibited speech reminds us to proceed with caution to consider not just the general outlines, but the specific facts of the case before us.[11]

As Judge Kaufman noted in *James v. Board of Education, supra,* 461 F.2d at 575:

> "It is characteristic of resolutions of first amendment cases, where the price of freedom of expression is so high and the horizons of conflict between countervailing interests seemingly infinite, that they do not yield simplistic formulas or handy scales for weighing competing values. 'The best one can hope for is to discern lines of analysis and advance formulations sufficient to bridge past decisions with new facts. . . .' *Eisner v. Stamford Board of Education,* 440 F.2d 803, 804 n.1 (2d Cir. 1971)."

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11 It is significant that the precise language of Justice Fortas' decision in *Tinker v. Des Moines School District, supra,* 393 U.S. at 514, defining the boundaries of permissible regulation of student speech became incorporated in a school board rule regulating the distribution of literature on school premises which this Court was obliged to strike down in *Eisner v. Stamford Board of Education,* 440 F.2d 803, 807 (2d Cir. 1971). As noted by this Court in *Thomas v. Board of Education, supra,* 607 F.2d at 1049, first amendment problems in the school area "are not easy of solution and much depends upon the specific facts before us."

Such considerations are relevant not only to our approach to the facts of the case before us, but also to an appreciation of the significance of past precedents. In circumstances in which so many interests and public policies converge, relatively minor changes in the pattern of facts presented "often deprive precedents of reliability and cast us more than we would choose upon our own judgment." *West Virginia State Board of Education v. Barnette, supra,* 319 U.S. at 640. "It is a frustrating process which does not admit of safe analytical harbors." *Eisner v. Stamford Board of Education,* 440 F.2d 803, 804-05 n.1 (2d Cir. 1971).[12]

II

The presence of these conflicting considerations affects, initially, the definition of what constitutes a *prima facie* case. Powers to prescribe what may or may not be said and what may or may not be read—powers which are "denied to most public officials," *Thomas v. Board of Education, supra,* 607 F.2d at 1049 n.10—are accorded to school officials because they are the necessary prerequisites to the formation of a school curriculum and the necessary prerequisites to the

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12 Thus, although both *James* and *Taylor* involved school regulations barring the wearing of black arm bands in secondary schools to protest the Vietnam war, this Court noted in *James, supra,* "there is merit to appellees' argument that *Tinker* does not control this case." 461 F.2d at 573. *Tinker* itself cited with approval both *Burnside v. Byars,* 363 F.2d 744 (5th Cir. 1966) and *Blackwell v. Issaquena County Board of Education,* 363 F.2d 749 (5th Cir. 1966) decided on the same day by the same panel, one upholding and the other striking down school board regulations prohibiting the wearing of freedom buttons on school property, because of a difference in the manner in which the children wearing the buttons had comported themselves at the two schools involved. *Tinker v. Des Moines School District, supra,* 393 U.S. at 509, 513.

stocking of a school library. "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson v. Arkansas, supra,* 393 U.S. at 104. As this Court has pointed out in *Presidents Council v. Community School Board, supra,* one cannot bring to court every decision by a school official involving the shelving or unshelving of a book in a school library without truly exposing the country to the danger which was the concern of the Supreme Court in *Minersville School District v. Gobitis,* 310 U.S. 586, 598 (1940), *overruled, West Virginia State Board of Education, supra,* that the federal courts will become "the school board for the country."

It is not simply the onerousness of the task of policing every decision involving the contents of course curriculum or a school library for first amendment violations which led to dismissal of the complaint in cases such as *President's Council.* The need for policing in such circumstances is, generally speaking, not there. The authority and responsibilities of our public school officials in the area are, by and large, so well understood and well performed that, absent extraordinary circumstances, there is no uncertain or "chilling" effect attendant on a decision to teach one subject rather than another or to select one from among many book titles competing for limited space on the library shelf. Just as it is well understood that "education would be impossible if teachers were forbidden to sanction incorrect responses or substandard essays with failing grades," *Thomas v. Board of Education, supra,* 607 F.2d at 1049, so it is well understood that the school library offers a more restricted choice than the

public library and that what is not taught in high school will be available in college. The everyday administration of a school's curriculum or a school library does not, either directly or indirectly, impinge on the free expression of ideas.

In these circumstances, bare allegations that books have been removed from the shelves of secondary school libraries by responsible officials do not make out a *prima facie* first amendment violation, even if the books have a controversial reputation so that one available inference is that they were removed to prohibit the expression of the ideas they contain. Such activities, being part of "the daily operation of school systems" do not "directly and sharply implicate basic constitutional values." *Epperson v. Arkansas, supra,* 393 U.S. at 104. On the contrary, the activity is on its face entirely consistent with the performance of the educational function conferred on school officials. Were it the case here, as in *President's Council,* that nothing more was at issue than the conflicting inferences to be drawn from the act of removal of a controversial text from the shelf of a high school library, we would affirm the decision of the district court because no cause of action had been stated.

In this case, however, we are presented with more than the inferences to be drawn from the act of removing controversial texts from library shelves, and more than the clearly understood routine and regular task of selecting titles for a school library. What we have instead is an unusual and irregular intervention in the school libraries' operations by persons not routinely concerned with their contents. Moreover, this intervention has occurred under circumstances, including the explanations for their actions given by the participants,

which so far from clarifying the scope and intentions behind the official action, create instead grave questions concerning both subjects. In circumstances of such irregularity and ambiguity, a *prima facie* case is made out and intervention of a federal court is warranted because of the very infrequency with which it may be assumed such intervention will be necessary and because of the real threat that the school officials' irregular and ambiguous handling of the issue will, even despite the best intentions, create misunderstanding as to the scope of their activities which will serve to suppress freedom of expression.

III

The cases, however, which have recognized a *prima facie* first amendment violation in some irregular and apparently arbitrary intervention in the daily operation of secondary school affairs have at the same time recognized that, because of the complexity of the social policies at work in the secondary school context, defenses—short of clear and present danger—must be recognized to permit the school official to establish that the education of the young cannot be handled entirely by routine procedures and even that "an added increment of chilling effect", *Thomas v. Board of Education, supra,* 607 F.2d at 1051, may have to be tolerated to perform adequately the task of educating the young. Thus, speech which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Tinker v. Des Moines,* 393 U.S. at 513. Justice Fortas' concern for "the rights of others" has found particularized recognition in this Circuit in the regulation of

language to protect the psychological well being of the young, *Trachtman v. Anker*, 563 F.2d 512 at 517 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978), and "to promote standards of civility and decency among school children," *Thomas v. Board of Education, supra*, 607 F.2d at 1057 (Newman, J., concurring).

To be sure, the burden of demonstrating such defenses rests with the school officials and the burden is one of persuasion, not of pleading.

> "As for the burden of proof, *Tinker*, as well as other federal cases establish that, if students choose to litigate, school authorities must demonstrate a reasonable basis for interference with student speech, and that courts will not rest content with officials' bare allegation that such a basis existed." *Eisner v. Stamford Board of Education, supra*, 440 F.2d at 810 (citations omitted).

Nor is the burden a light one.

> "Any limitation on the exercise of constitutional rights can be justified only by a conclusion, based on reasonable inferences flowing from concrete facts and not abstractions, that the interests of discipline or sound education are materially and substantially jeopardized. . . ." *James v. Board of Education, supra*, 461 F.2d at 571.

Moreover, and of principal importance to the resolution of the issues presented by this case, the burden is not simply to demonstrate that there is a basis for the school officials' actions. As stated in this Circuit in *Eisner v. Stamford Board of Education, supra*, 440 F.2d at 806, while we are concerned, first,

with whether the Board's 'policy [is] justified as included within one or more of the categories of exceptional cases" in which regulation of speech is permitted in the schools,

> "[s]econd, is the policy as narrowly drawn as may reasonably be expected so as to advance the social interests that justify it or, to the contrary, does it unduly restrict protected speech, to an extent 'greater than is essential to the furtherance of' those interests? *See United States v. O'Brien,* 391 U.S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). In light of *Freedman* [*v. Maryland,* 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965)], the latter question might usefully be addressed, alternatively, to the substantive and to the procedural aspects of the policy—that is, first to the criteria by which school officials are permitted to bar literature from the school and second to the means by which the bar is to be effected." *Id.*

The rationale for this concern with the manner in which the regulation is carried out is that summarized in *Keyishian v. Board of Regents, supra,* 385 U.S. at 603-04:

> "We emphasize once again that '[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms,' *N.A.A.C.P. v. Button,* 371 U.S. 415, 438. . . . 'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.' *Id.* at 432, 433. . . . When one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful

> zone. . . .' *Speiser v. Randall,* 357 U.S. 513, 526. For '[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions.' *N.A.A.C.P. v. Button, supra,* at 433. The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform . . . what is being proscribed."

Whatever may be said in favor of the good intentions of the school officials in this case—and more will be said on that subject, *infra*—little may be said in support of their sensitivity or precision in dealing with the first amendment issues in this case. On the substantive side, the criteria for removal suggested by the evidence suffer from excessive generality and overbreadth. Whatever definiteness there may be in a complaint that a book is "filthy," *Hamling v. United States,* 418 U.S. 87 (1974), there is certainly no precision, sufficient to provide the kind of reasonably clear guidance necessary for free and open debate, in the complaints that books are "anti-Christian" or "anti-American." *See Keyishian v. Board of Regents, supra,* 385 U.S. at 598-99. The very nature of this broad brush approach must inevitably be to suggest that the school officials' concern is less to cleanse the libraries of all books containing material insulting to members of one or another religious group or which evidences an inaccurate view of the nation's history, than it is to express an official policy with regard to God and country of uncertain and indefinite content which is to be ignored by pupils, librarians and teachers at their peril.

However, quite apart from the articulated criteria for selection of the books for removal, precision of regulation and sensitivity to first amendment concerns

are hardly established by the erratic, arbitrary and free-wheeling manner in which the defendant school officials proceeded in this case. The books were removed from school library shelves before any concerned school official had read them, solely on the basis of mimeographed quotations collected by anonymous readers whose editorial comments revealed political concerns reaching far beyond the education and well-being of the children of the Island Trees Union Free School District. Moreover, so far from seeking to insure that the "prejudices of the community" not infringe individual free speech and so far from recognizing "that the will of the transient majority can prove devastating to freedom of expression," *James v. Board of Education, supra,* 461 F.2d at 575, defendants conducted themselves, despite warnings by their school Superintendent, in a manner calculated to create public uproar. By drawing the "book issue" into the School Board election, a labor dispute, public meetings (at which "we are confident" that "most of the parents . . . will back us to the hilt") and then into a district-wide plebiscite, they insured that the impression would be created that freedom of expression in the District would be determined in some substantial measure by the majority's will. Having proceeded in this fashion, defendants are hardly in a position to carry their burden of establishing that they have not, in pursuit of their functions, "unduly restricted protected speech to an extent greater than is essential" to the furtherance of the interests sought to be protected. *Eisner v. Stamford Board of Education, supra,* 440 F.2d at 806. On the contrary, the Board's erratic and free-swinging procedures inevitably leave it a matter of guesswork for teachers, librarians and students in the District

whether other efforts at self-expression on their part will be curtailed with equally little notice and equally little opportunity for defense, in the name of policies having equally little to do with the local concerns of the educational community, subject to the equally uncertain outcome of public debate. As this Court has said, the erratic, unfair and arbitrary administration of policy with regard to speech in schools is as much to be feared as the contents of the policy itself as a source of first amendment violations. *Eisner v. Stamford Board of Education, supra,* 440 F.2d at 809. We require greater "sensitivity to some of the teaching reflected in relevant constitutional doctrine and to the dangers lurking in improper and unconstitutional administration" than is demonstrated by the Board of Education in this case. *Id.* at 809-10. Not only must there be "narrow specificity" in the criteria applied, but there must be the use of "sensitive tools" in their application. *Keyishian v. Board of Regents, supra,* 385 U.S. at 603-04.

Finally, even were defendants in a position to carry their burden of establishing that there was a substantial and material basis for their actions and that their actions were possessed of sufficient procedural regularity to give a better basis than guesswork as to how the Board of Education would act in the future with regard to similar issues, plaintiffs below should have, in all events, been offered an opportunity to persuade a finder of fact that the ostensible justifications for defendants' actions—be it indecency or ungrammatical usage, as one defendant suggested, or some other ground—were simply pretexts for the suppression of free speech. As was recognized in *Cohen v. California,* 403 U.S. 15, 26 (1970), government may not "seize

upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." *See FCC v. Pacifica Foundation, supra,* 438 U.S. at 746.

Clearly, mere reference by a defendant to personal standards of taste or political philosophy as one factor in a decision involving first amendment values cannot, in and of itself, provide a basis for rationally inferring an intent to suppress the different views of others. Courts cannot prohibit and, indeed, should encourage, within limits, the thoughtful application of personal standards of taste and morality and of political belief in the performance of governmental functions. Where, however, as in this case, evidence that the decisions made were based on defendants' moral or political beliefs appears together with evidence of procedural and substantive irregularities sufficient to suggest an unwillingness on the part of school officials to subject their political and personal judgments to the same sort of scrutiny as that accorded other decisions relating to the education of their charges, an inference emerges that political views and personal taste are being asserted not in the interests of the children's well-being, but rather for the purpose of establishing those views as the correct and orthodox ones for all purposes in the particular community. What was said in *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252, 267 (1977), applies here:

> "The historical background of the decision is one evidentiary source. . . . The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmakers' purposes. . . . Departures from the normal procedural sequence also might afford evidence that

improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decision maker strongly favor a decision contrary to the one reached."

Among the procedural and other irregularities which warrant an inference that the welfare and education of the children of the Island Trees School District were not the true motivating concerns which led to the removal of the books from school libraries in that District are, in addition to those already mentioned: defendants' substantive confusion, not to say incoherence, as to the reasons the books were being removed from the libraries; the informal and dilatory manner in which the matter was pursued, including the lapse of three months from the time the presence of the offending books was discovered in the libraries until the principals of the schools were asked to take some action to prevent children from reading them, *cf. Thomas v. Board of Education, supra,* 607 F.2d at 1052 n.17 (delay of six days by school officials in acting on complaint); the *ex post facto* appointment of a committee to review the removal of the books, the determinations of which were then, without explanation, not followed by the Board; the strong opposition of professional personnel, including the District Superintendent, to the procedures used by the Board, *cf. Thomas v. Board of Education, supra,* 607 F.2d at 1051 (noting the origin of the complaint with the President of the Board of Education, rather than with school administrative officials); and, finally, the "substantive" irregularities, as *Arlington Heights* puts it, of removing works by such generally recognized authors as Swift, the late Richard Wright, and Bernard Malamud, whose

book, *The Fixer,* was, indeed, an assigned high school reading text.

In summary, the writer concludes that plaintiffs made out a *prima facie* case of a first amendment violation and that defendants failed to carry their burden of establishing that the manner, if not the motive for their actions, did not violate the first amendment.[13] In addition, the writer is of the view that, even had defendants' case in support of their

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13 Judge Newman concludes that a trial is required to determine the effect of defendants' conduct on plaintiffs' exercise of their first amendment rights, since plaintiffs have not been threatened with punishment for expressing ideas contained in the offending books. As Judge Newman points out in his opinion, however, what is at issue is the degree of risk that ideas will be suppressed as a result of defendants' conduct. Once all copies of the books containing the offending ideas have been ordered removed from the school library under the circumstances here presented, it hardly requires a trial, in my view, to determine that the risk is overwhelming that students will conclude that they are not at liberty to express the same thoughts themselves and that they will be appropriately punished if they do so. To hold, as Judge Newman would, that potential plaintiffs must, when faced with similar conduct by school boards in the future, contemplate the prospect of plenary trial in our congested district courts in order to vindicate their first amendment rights is, in my view, to impose too great a burden on free speech.

Judge Mansfield is mistaken in reading the majority opinion as condemning the application by school boards of personal taste, political beliefs or local community standards to decisions concerning the contents of school libraries in this Circuit. *Cf. Zykan v. Warsaw Community School Corp.,* ___ F.2d ___ (7th Cir. Aug. 22, 1980). The opinion says the contrary. There is, however, a difference between applying one's personal taste or political views to the formulation of school policy and simply requiring conformity by students and teachers with subjective and intangible standards of personal morality or political philosophy. What is required in order to avoid the effect of governing school affairs simply by a vague and indefinite pall of orthodoxy is the development of a set of sufficiently objective criteria for the identification of speech which will be objected to and a sufficiently regular procedure for applying those criteria in concrete cases to permit students to determine with a reasonable degree of certainty what speech will be prohibited and when. This is not accomplished by the Board's March Newsletter to all families in the District expressing the Board's loosely stated

actions been more compelling, plaintiffs were improperly deprived of an opportunity to persuade the finder of fact that the proffered justifications were mere pretext for an intentional violation of their rights. While neither the right of free expression nor the free-swinging style of the Board of Education in the Island Trees Union Free School District may seem, from all perspectives, of great significance, as Justice Jackson said with characteristic conciseness in the seminal case in this area, *West Virginia v. Barnette, supra,* 319 U.S. at 638 (1943):

> "There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond the reach of the Constitution."

Since the majority is of the view that defendants were not entitled to judgment below and that plaintiffs are entitled to proceed with the prosecution of their claims, we reverse and remand to the district court for trial.

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findings (". . . the books . . . contain material that is offensive to Christians, Jews, Blacks, and Americans in general. In addition, these books contain obscenities, blasphemies, brutality, and perversion beyond description"), its peremptory conclusion (". . . we all agree that these books simply DO NOT belong in the school libraries . . ."), and its vague warning ("It is our duty, our moral obligation, to protect the children of our schools from this moral danger as surely as from physical and medical dangers"). This message, of course, preceded the April appointment of the book review committee as well as the later efforts by the Board members, in response to the plaintiffs' motion for summary judgment in this case, to explain their actions principally, although still not entirely, in terms of the books' vulgarity and indecency. Nothing in this later history, in my view, serves to dispel the effect upon first amendment rights of the Board's initial manner of dealing with the issue, and, as noted in the body of this opinion, much occurred thereafter which only served to make the situation worse.

MANSFIELD, *Circuit Judge* (Dissenting):

I dissent. The majority unjustifiable overrules our sound decision in the indistinguishable case of *Presidents Council District 25 v. Community School Board No. 25*, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972), wherein we held that removal by school authorities from a school library of a book containing vulgarities and indecent matter on the ground that the book was educationally inappropriate for school children did not infringe any First Amendment rights.

In my view the majority's action represents an unwarranted interference with the rational exercise by the Board of Education of the Island Trees Union Free School District (the Board) of its statutory duty to prescribe appropriate materials for the education of the children in the district. Despite undisputed evidence that all but one of the eight books discontinued by the Board in this case contained indecent matter, vulgarities, profanities, explicit sexual descriptions or allusions, sexual perversion, or disparaging remarks about Blacks, Jews or Christ, and despite the freedom of the school's faculty and students to discuss in or out of school the ideas contained in the discontinued books, the majority would find a violation of the First Amendment based on possible violation of some vague, undefined rights of expression or on possible suppression of ideas on the part of secondary school children attending the school. Absent some evidence that speech or ideas by anyone are likely to be suppressed I believe this court should keep its hands off. The effect of the majority's decision is improperly to substitute a court's view of what student curriculum is appropriate for that of the Board.

The majority takes some liberties with the record, substituting suspicions for undisputed evidence. In the first place the best evidence of whether the eight discontinued books are unsuitable for the education of secondary school children is the text of the books themselves rather than the conclusory editorial comments of third parties which Judge Sifton cites while studiously avoiding quotation of the actual text objected to by the Board as indecent and improper. Accordingly, adopting the Supreme Court's practice in similar cases, see e.g. *Federal Communications Commission v. Pacifica Foundation,* 438 U. S. 726 (1978), I have set forth in the margin those portions of the text of the books which led the Board to investigate their suitability as educational tools and to discontinue eight of the books.[1] Despite Judge Sifton's conclusion that

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1 The excerpts which led the Board to look into the educational suitability of the books in question are set out (with minor corrections after comparison with the text of the books themselves) below. The pagination and the underlinings are retained from the original report used by the board. In newer editions of some of the books, the quotes appear at different pages.

1) *SOUL ON ICE* by Eldridge Cleaver

PAGE *QUOTE*

157-158 ". . . There are white men who will pay you to fuck their wives. They approach you and say, 'How would you like to fuck a white woman?' 'What is this?' you ask. 'On the up-and-up,' he assures you. 'It's all right. She's my wife. She needs black rod, is all. She has to have it. It's like a medicine or drug to her. She has to have it. I'll pay you. It's all on the level, no trick involved. Interested?' You go with him and he drives you to their home. The three of you go into the bedroom. There is a certain type who will leave you and his wife alone and tell you to pile her real good. After it is all over, he will pay you and drive you to wherever you want to go. Then there are some who like to peep at you through a keyhole and watch you have his woman, or peep at you through a window, or lie under the bed and listen to the creaking

the excerpts leave "no great sense of confidence in the literary accuracy of the quotations," I find, upon

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of the bed as you work out. There is another type who likes to masturbate while he stands beside the bed and watches you pile her. There is the type who likes to eat his woman up after you get through piling her. And there is the type who only wants you to pile her for a little while, just long enough to thaw her out and kick her motor over and arouse her to heat, then he wants you to jump off real quick and he will jump onto her and together they can make it from there by themselves."

2) *A HERO AIN'T NOTHING BUT A SANDWICH* by Alice Childress

PAGE	*QUOTE*
10	Hell, no! *Fuck the society.*
64-65	The hell with the junkie, the wino, the capitalist, the welfare checks, the world . . . yeah, and *fuck* you too!
75-76	They can have back the spread and curtains, I'm too old for them *fuckin* bunnies anyway.

3) *THE FIXER* by Bernard Malamud

PAGE	*QUOTE*
52	What do you think goes on in the wagon at night: Are the drivers on their knees *fucking their mothers?*
90	*Fuck yourself,* said the blinker, etc.
92	Who else would do anything like that but a *motherfucking* Zhid?
146	No more noise out of you or I'll shoot your *Jew cock off.*
189	Also there's a lot of *fucking in the Old Testament,* so how is that religious?
192	You better go *fuck yourself,* Bok, said Kogin, I'm onto your Jew tricks.
215	Ding-dong, giddyap. A *Jew's cock's* in the devil's hock.
216	You *cocksucker* Zhid, I ought to make you lick it up off the floor.

4) *GO ASK ALICE* by *Anonymous*

PAGE	*QUOTE*
31	I wonder if sex without acid could be so exciting, so wonderful, so indescribable. I always thought it just took a minute, or that it would be like dogs mating.

(footnote continued on next page)

reading the books, that except for minor errors the quotations are indeed accurate. I also note that some of

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47	Chris and I walked into Richie and Ted's apartment to find the bastards stoned and making love to each other . . . low class queer.
81	shitty, goddamned, pissing, ass, goddamned beJesus, screwing life's, ass, shit. Doris was ten and had *humped* with who knows how many men in between . . . her current stepfather started having sex with her but good . . . *sonofabitch balling her*
83	but now when I face a girl its like facing a boy. I get all excited and turned on. *I want to screw with the girl.* . . .
84	I'd rather screw with a guy . . . sometimes I want one of the girls to kiss me. I want her to touch me, to have her sleep under me.
"	Another day, another *blow job* . . . If I don't give *Big Ass a blow* he'll cut off my supply . . . and LittleJacon is yelling, "Mama, *Daddy can't come now. He's humping Carla.*"
85	Shit, goddamn, goddamn prick, son-of-a-bitch, ass, pissed, bassard, goddamn, bullshit
94	I hope you have a *nice orgasm with your dog tonight.*
110	You *fucking* Miss Polly pure
117	Then he said that all I needed was a good *fuck.*
146	It might be great because I'm practically a virgin in the sense that I've never had sex except when I've been stone. . . .

5) *SLAUGHTERHOUSE FIVE* by Kurt Vonnegut, Jr.

PAGE	*QUOTE*
29	"Get out of the road, you dumb *motherfucker.*" The last word was still a novelty in the speech of white people in 1944. It was fresh and astonishing to Billy, who had never *fucked* anybody . . .
32	You stake a guy out on an anthill in the desert—see? He's facing upward, and you put *honey* all over his *balls and pecker,* and you cut off his eyelids so he has to stare at the sun till he dies.
34	He had a prophylactic kit containing two tough condoms "For the prevention of disease only!" . . . He had a dirty picture of a *woman* attempting *sexual intercourse* with a *shetland pony.*

(footnote continued on next page)

the books contain additional indecent statements not found in the original excerpts.

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94 & 95 But the Gospels actually taught this: Before you kill somebody, make absolutely sure he isn't well connected . . . The flaw in the Christ stories, said the visitor from outer space, was that Christ, didn't look like much, was actually the son of the Most Powerful Being in the Universe. Readers understood that, so, when they came to the crucifixion, they naturally thought . . Oh boy—they sure picked the wrong guy to lynch this time! And that thought had a brother: There are right people to lynch. People not well connected . . The visitor from outer space made a gift to Earth of a new Gospel. In it, Jesus really WAS a nobody, and a pain in the neck to a lot of people with better connections than he had . . So the people amused themselves one day by nailing him to a cross and planting the cross in the ground. There couldn't possibly be any repercussions, the lynchers thought . . since the new Gospel hammered home again and again what a nobody Jesus was. And then just before the nobody died . . The voice of God came crashing down. He told the people that he was adopting the bum as his son . . . God said this: *From this moment on, He will punish horribly anybody who torments a bum who has no connections.*

99 They told him that there could be no Earthling babies without male homosexuals. There could be babies without female homosexuals.

120 Why don't you go *fuck* yourself? Don't think I haven't tried . . he was going to have revenge, and that revenge was sweet . . . It's the sweetest thing there is, said Lazzaro. People *fuck* with me, he said, and *Jesus Christ* are they ever fucking sorry.

122 And he'll pull out a gun and *shoot his pecker off.* The stranger'll let him think a couple of seconds about who Paul Lazzaro is and what life's gonna be like without a *pecker.* Then he'll shoot him once in the guts and walk away . . . He died on account of this silly *cocksucker* here. So I promised him I'd have this silly *cocksucker* shot after the war.

134 In my prison cell I sit . . . With my *britches full of shit,* And my *balls are bouncing* gently on the floor. And I see the bloody snag when she bit me in the bag . . . Oh, I'll never *fuck a Polack* any more.

(footnote continued on next page)

· The suggestion by Judge Sifton that the Board was engaged in "an unusual and irregular intervention" into

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173	And the *peckers* of the young men would still be *semierect,* and their *muscles* would be *bulging like cannonballs.*
175	They didn't have *hard-ons* . . . Everybody else did.
177	The magazine, which was published for *lonesome men to jerk off to.*
178	and one critic said. . . . "To describe *blow-jobs* artistically.

6) *THE BEST SHORT STORIES BY NEGRO WRITERS* Ed. by Langston Hughes

PAGE	*QUOTE*
176	"like bat's shit and camel piss,"
228	"that no-count bitch of a daughter of yours is up there up North making a whore of herself."
237	"they made her get out and stand in front of the headlights of the car and pull down her pants and raise her dress—they said that was the only way they could be sure. And you can imagine what they said and what they did—."
303	"You need some pussy. Come on, let's go up to the whore house on the hill." "Oh, these bastards, these bastards, this God damned Army and the bastards in it. The sons of bitches!"
436	"he produced a brown rag doll, looked at her again, then grabbed the doll by its legs and tore it part way up the middle. Then he jammed his finger into the rip between the doll's legs. The other men laughed. . . ."
444	"The pimps, hustlers, lesbians, and others trying to misuse me."
462	"But she had straight firm legs and her breasts were small and upright. No doubt if she'd had children her breasts would be hanging like little empty purses."
464	"She first became aware of the warm tense nipples on her breasts. Her hands went up gently to clam them." "In profile, his penis hung like a stout tassle. She could even tell that he was circumcised."
406	"Cadillac Bill was busy following Luheaster around, rubbing her stomach and saying, 'Magic Stomach, Magic Stomach, bring me a little baby cadillac.'" "One of the

the operation of the school's library by persons not "concerned with their contents" flies in the face of the

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girls went upstairs with Red Top and stayed for about forty five minutes."

7) *BLACK BOY* by Richard Wright

PAGE	*QUOTE*
70-71	"We black children—seven or eight or nine years of age—used to run to the Jew's store and shout: . . . Bloody Christ Killers Never trust a Jew Bloody Christ Killers What won't a Jew do . . . Red, white and blue Your pa was a Jew Your ma a dirty dago What the hell is you?"
265	"Crush that nigger's nuts, nigger!" "Hit that nigger!" "Aw, fight, you goddam niggers!" "Sock 'im, in his f—k—g piece!" "Make 'im bleed!"

8) *LAUGHING BOY* by Oliver LaFarge

PAGE	*QUOTE*
38	"I'll tell you, she is all bad; for two bits she will do the worst thing."
258-9	"I was frightened when he wanted me to lie with him, but he made me feel all right. He knew all about how to make women forget themselves, that man."

9) *THE NAKED APE* by Desmond Morris

PAGE	*QUOTE*
73-74	"Also, the frontal approach provides the maximum possibility for stimulation of the female's clitoris during the pelvic thrusting of the male. It is true that it will be passively, stimulated by the pulling effect of the male's thrusts, regardless of his body position in relation to the female, but in a face-to-face mating there will in addition be the direct rhythmic pressure of the male's pubic region on to the clitoral area, and this will considerably heighten the stimulation . . ." "So it seems plausible to consider that face-to-face copulation is basic to our species. There are, of course, a number of variations that do not eliminate the frontal element; male above, female above, side by side, squatting, standing, and so on, but

uncontroverted facts and the Board's duties under New York law. Under N.Y. Education Law § 1709 a local school board such as the Board here has both the power and duty to prescribe the books to be used in its schools.[2] There is also no support for statements by

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the most efficient and commonly used one is with both partners horizontal, the male above the female. . . ."

80 ". . . This broadening of the penis results in the female's external genitals being subjected to much more pulling and pushing during the performance of pelvic thrusts. With each inward thrust of the penis, the clitoral region is pulled downwards and then, with each withdrawal, it moves up again. Add to this the rhythmic pressure being exerted on the clitoris region by the pubic region of the frontally copulating male, and you have a repeated massaging of the clitoris that—were she a male—would virtually be masturbatory."

94-99 ". . . If either males or females cannot for some reason obtain sexual access to their opposite numbers, they will find sexual outlets in other ways. They may use other members of their own sex, or they may even use members of other species, or they may masturbate. . . ."

10) *READERS FOR WRITERS.* See note 6 *infra.*

2 N.Y. Education Law § 1709 (McKinney's) reads in pertinent part as follows:

"§ 1709. *Powers and Duties of Boards of Education*

The said board of education of every union free school district shall have the power and it shall be its duty:

• • • • • •

3. To prescribe the course of study by which the pupils of the school shall be graded and classified. . . .

4. To prescribe the text-books to be used in the schools. . . .

• • • • • •

9. To take charge and possession of . . . the books, apparatus, and all school property within its district; and the title of the same shall be vested respectively in said board of education. . . .

• • • • • •

(footnote continued on next page)

Judge Sifton that the Board acted arbitrarily, impulsively, confusingly, incoherently, erratically, dilatorily or in a "free-swinging" manner. This was no bookburning or banning on the part of zealous intermeddlers. Nor was its action in disregard of the rights and views of others. On the contrary, the Board acted carefully, conscientiously and responsibly after according due process to all parties concerned.

The Board's first step was not to remove the books permanently, as the majority suggests, but to transfer them to the School's Residence Reference Room for review by the Board. The decision to do this was not made until February 26, 1976, after all members had seen the objectionable excerpts and some had read at least a few of the books. The actual transfer within the confines of the school occurred on March 3, 1976 after the President of the Board (Ahrens), implementing the Board's decision, requested the school's Superintendent Richard G. Morrow to have the books taken "to the

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13. To have in all respects the superintendence, management and control of said union free schools. . . .

33. To have in all respects the superintendence, management and control of the educational affairs of the district, and, therefore, shall have all the powers reasonably granted expressly or by implication by this chapter or other statutes."

§ 701 of the Education Law, subdivision 1 states in pertinent part:

"In the several cities and school districts of the state, boards of education . . . shall designate textbooks to be used in the schools under their charge."

§ 91.1 of the Regulations of the Commissioner of Education states:

"A school library shall be established and maintained in each school. The library in each elementary school shall meet the needs of the pupils, and shall provide an adequate complement to the various areas of the curriculum."

It also requires a minimum of 1,000 titles each for a junior and senior high school library.

Board's office at the rear of the Residents Reference Room in Stokes *for review by the Board,"* (emphasis supplied). In view of the excerpts (quoted in Footnote 1, supra), the impressions gained by members who had read some of the books, and the need for all seven members of the Board to read all of the books in order to form their judgments (every one of the limited number of copies would obviously be needed for the purpose), the transfer of the books was eminently sensible. The Board's appointment of an eight-person advisory committee to read the books and make recommendations and the Board's later vote continuing two of the ten books as part of the curriculum demonstrate that the March 3rd action was far from final.

That the Board did not prejudge the educational suitability of the books is attested to by its decision not to take any action until it had the views of others, including a cross-section of the school staff and the community. On March 30, 1976, it held a public meeting at which its seven members voted unanimously to appoint an eight-person committee comprised of four members of the school staff and four parents to review and make recommendations regarding the educational suitability of the books and whether they were in good taste, appropriate for the age and grade level, and relevant.[3] In early April it appointed the Committee.

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3 Judge Sifton's opinion quotes at length (at pp. 7-9) portions of a memorandum by Superintendent Richard G. Morrow to the Board dated February 27, 1976, disapproving a procedure whereby the Board might act unilaterally or precipitously on the basis of excerpts or lists prepared by others without first reading the books. The opinion also quotes portions of a Board press release issued on March 19, 1976, in response to articles in the press regarding the book issue. The impression given by these partial quotations is that the Board had prejudged the issue of whether the 10 books should be

The four community members consisted of a recently graduated student attending college, a former PTA president, a former Board president and a mailman; the four staff members were an English teacher, a social studies teacher, a high school principal and an elementary school principal. The appointment of the Committee had been recommended and was approved by the School Superintendent, Richard G. Morrow.

During the weeks that followed the eight Committee members read all but one of the 10 books under consideration,[4] held a series of meetings, and on July 1, 1976, submitted its report to the Board. Its recommendations were as follows: (1) that *The Fixer* be "returned to the Modern Literature curriculum, subject to parental appróval"; (2) that four others, *Laughing Boy, Black Boy, Go Ask Alice* and *Best Short Stories by Negro Writers,* be "retained" (i.e. kept in the library); (3) that two books, *The Naked Ape* and *Down These Mean Streets,* be "removed from the library" and (4) *Slaughter House Five* be "put—on a restricted shelf." Except for three books on which the 8-person

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discontinued as part of the School's curriculum, had permanently removed them, to which Superintendent Morrow was objecting.

However, the balance of Mr. Morrow's memorandum, as well as his later similar memorandum to the public dated March 30, 1976 (entitled "Statement Concerning the Book Issue"), when the Board held a public hearing on the issue, reveals that he was recommending that a joint parent-school authority Committee be appointed to study the books and make recommendations to the Board. This was substantially the procedure adopted by the Board at its March 30, 1980, public meeting with Superintendent Morrow's approval, and instituted in early April.

4 Because of the unavailability of sufficient copies of *A Reader for Writers* most members of the Committee were unable to read the book within a reasonable length of time and could not therefore make a recommendation.

Committee's vote was unanimous, its votes were divided, ranging from 7-1 to 5-3. With respect to two books, *Soul on Ice* and *A Hero Ain't Nothing but a Sandwich,* the Committee could not agree, four voting in each case for retention and four for removal. The Committee was unable to make a recommendation with respect to the tenth book, *A Reader for Writers* because not all members had to read it.

On July 28, 1976, the seven-person Board, having had a chance to review the books again in light of the Committee's recommendations, made its decision with respect to each of the 10 books under consideration. The Board decided: (1) unanimously to retain *Laughing Boy,* (2) by a 6-1 vote to retain *Black Boy* on a restricted basis, (3) by a unanimous vote to discontinue *Slaughter House Five, The Naked Ape, Down These Mean Streets, Soul on Ice, Best Short Stories by Negro Writers* and *A Reader for Writers,* from use in the School's curriculum, (4) by a 6-1 vote to remove *Go Ask Alice* from use in the curriculum, one member voting to retain it on a restricted basis, (5) by a 5-2 vote to remove *A Hero Ain't Nothing But a Sandwich* from use in the curriculum, 2 members (including Martin) voting to retain it on a restricted basis, (6) by a 5-3 vote to remove *The Fixer* from use in the curriculum, 2 members (including Martin) voting to retain it on a restricted basis and 1 member to retain it with no restrictions.

The retention of two of the ten books by the Board and its divided vote with respect to three is in my view wholly inconsistent with a claim that the Board acted erratically, arbitrarily, or in a "free-swinging style." Since the Board could not delegate its statutory duty and the Committee's recommendations were advisory

only, the Board was entitled to differ from the Committee's recommendations, provided a rational basis existed for its doing so. Five members of the Board later attested to such a basis when they swore,

> 2. That we have read each of the books reviewed by the committee referred to in the affidavits of Mr. Martin and Mr. Ahrens.
>
> 3. That we each thoroughly considered the recommendations of such committee, the opinions of the superintendent of schools and of members of the community before casting our respective votes with respect to these books (Exhibit "A-15").
>
> 4. That our reasons for casting votes to remove or restrict certain volumes were that they contained obscenities, were irrelevant to our curriculum, were inappropriate and were in bad taste. They contained foul language, gross sexual allusions and language that just wasn't necessary to the story line. Our votes were, however, split on certain works as a result of varying degrees of concern about the relevancy, educational applicability and degree of bad taste exhibited.
>
> 5. That we feel we represented the basic values of the community in our actions and that we have exercised our duties in an intelligent, thoughtful and reasonable manner.

Similar, more detailed affidavits and depositions were furnished by Richard Ahrens, President of the Board and Frank Martin, Vice-President (who, after reading the books, voted in favor of retention of some which other members voted to remove from the curriculum).

Specific reasons have been given by each for his action with respect to each book. Martin voted to place on the restricted list books in which vulgarity appeared reasonably necessary to the story line but to remove those that indulged in vulgarity, deviant behavior and explicit sex scenes solely for their own sake. Mr. Ahrens objected to the degrading treatment of blacks and the vulgarity in *Soul on Ice,* the poor grammar in *A Hero Ain't Nothing But a Sandwich,* glorification of sex and drugs in *Go Ask Alice,* the explicitness of sex in *The Naked Ape,* which violated the Board's policy against teaching sex education, the vulgarities and anti-Semitism in *The Fixer* and the sadism of *Slaughter-house Five.*

DISCUSSION

The general principles governing judicial intervention into secondary school education for the purpose of protecting First Amendment rights of students and teachers are fairly well settled. Students do not surrender all of their individual rights by submitting to the public educational process. Their speech and free exchange of ideas will be protected as long as they do not interfere with, obstruct or disrupt the functioning of the teaching system, including the choice of curriculum and methods prescribed by those vested with the duty of providing them with a formal education. For instance, a student may not be punished for refusing to salute the American flag, *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943), or wearing an armband in symbolic opposition to Viet Nam hostilities, *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503

(1969). Nor may he be barred from off-campus printing and distribution of an indecent publication, *Thomas v. Board of Education,* 607 F.2d 1043 (2nd Cir. 1979). Similarly, an instructor may not be disciplined or barred from teaching because he symbolically expresses his personal political views by wearing a black armband in class, *James v. Board of Education,* 461 F.2d 566 (2nd Cir.), *cert. denied* 409 U.S. 1042 (1972), because he is labelled a "subversive," *Keyishian v. Board of Regents,* 385 U.S. 589 (1967), or because he or she refuses to salute the flag, *Russo v. Central School District No. 1,* 469 F.2d 623 (2nd Cir. 1972).

On the other hand, the process of public education, if it is to succeed, mandates that "school officials must have some latitude within the school in punishing and prohibiting ordinarily protected speech both out of regard for fellow students who constitute a captive audience, and in recognition of the fact that the school has a substantial educational interest in avoiding the impression that it has authorized a specific expression," *Thomas, supra,* 607 F.2d at 1049. "School authorities can regulate indecent language because its circulation on school grounds undermines their responsibility to try to promote standards of decency and civility among school children," *Id,* 1057 (Newman, J., concurring).

Public secondary school education can function effectively only if school boards are accorded rather broad discretionary authority to determine the subjects to be taught, the curriculum deemed most suitable, the methods of teaching to be employed, and the disciplines to be followed by teachers and students within the school, including the educational tools to be used, whether those tools be test tubes in the laboratory or books in the library. If each student were free to insist

that the curriculum, including library books, be changed or augmented to suit his ideas or those of his parents, chaos would ensue. The result would be no different than if a student were permitted to speak out in class whenever he wished or to refrain from studying prescribed subjects that were unappealing to him. Such conduct does not fall within protected First Amendment rights. *Tinker, supra,* 607 F.2d at 1049.

For these reasons the Supreme Court emphasized in *Epperson v. Arkansas,* 393 U.S. 97, 104 (1968) that

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.

As the Court had warned in *Abington School Dist. v. Schempp,* 374 U.S. 203, 30001 (1963) (Brennan, J., concurring):

> We should heed Mr. Justice Jackson's caveat that any attempt by this Court to announce curricular standards would be "to decree a uniform, rigid and, if we are consistent, an unchanging standard for countless school boards representing and serving highly localized groups which not only differ from each other but which themselves from time to time change attitudes." *Illinois ex rel. McCollum v. Board of Education, supra,* [333 U.S.] at 237.

Recognizing the deference that must be paid to school authorities in such matters the Court in *Epperson, supra,* established as a standard that we may not intervene in decisions of school systems unless they "*directly and sharply* implicate basic constitutional values," 393 U.S. at 104 (emphasis supplied). This test clearly requires, as a condition precedent to judicial intervention, a showing that the schools action (1) violates the students' right of expression and (2) is not reasonable related or necessary to the performance by the school of its educational function. A school board's decision as to curriculum, moreover, may properly reflect local community views and values as to educational content and analysis, *James v. Board of Education,* 461 F.2d 566, 573 (2nd Cir.), *cert. denied,* 409 U.S. 1042 (1972):

> The interest of the state in promoting the efficient operation of its schools extends beyond merely securing an orderly classroom. Although the pros and cons of progressive education are debated heatedly, a principal function of all elementary and secondary education is indoctrinative—whether it be to teach the ABC's or multiplication tables or *to transmit the basic values of the community.* "[S]ome measure of public regulation is inherent in the very provision of public education." Note, Developments in the Law-Academic Freedom, 81 Harv. L. Rev. 1045, 1053 (1968). Accordingly, courts consistently have affirmed that curriculum controls belong to the political process and local school authorities. (emphasis supplied)

This inherent function of school administration was relied on by the Seventh Circuit in its recent opinion in *Zykan v. Warsaw Community School Corp.*, ____ F.2d ____ Dkt. No. 80-1038 (Slip Op. Aug. 22, 1980), which held that actions similar to those involved in this case (including the removal of *Go Ask Alice* from the library) simply did not rise to the level of constitutional violations. The court said, it is "permissible and appropriate for local boards to make educational decisions based upon their personal social, political and moral views." Slip Op. at 10.

Recognizing these principles, this circuit upheld a school board's prohibition or regulation of the use on school property of expressions and subject matter that would be fully protected outside the school premises. In *Presidents Council, District 25 v. Community School Board,* No. 25, 457 F.2d 289 (2nd Cir.), *cert. denied,* 409 U.S. 998 (1972), for instance, we upheld the right of a community school board to remove from all junior high school libraries one of the books that was discontinued by the Board here, *Down These Mean Streets* by Piri Thomas.[5] In holding that the board's removal of the book did not impinge on any basic constitutional rights, we stated:

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5 Judge Mulligan summarized the contents of *Down These Mean Streets* as follows:

> "The book, which has created the controversy and provoked the action of the Board, *Down These Mean Streets,* is an autobiographical account by Piri Thomas, of a Puerto Rican youth growing up in the East Side Barrio (Spanish Harlem) in New York City. Predictably the scene is depressing, ugly and violent. The argot of the vicinage is replete with four letter and twelve letter obscenities unreported by Tom Swift or even Tom Jones. Acts of criminal violence, sex, normal and perverse, as well as episodes of drug shooting are graphically described." 547 F.2d 291.

Since we are dealing not with the collection of a public book store but with the library of a public junior high school, evidently some authorized person or body has to make a determination as to what the library collection will be. It is predictable that no matter what choice of books may be made by whatever segment of academe, some other person or group may well dissent. The ensuing shouts of book burning, witch hunting and violation of academic freedom hardly elevate this intramural strife to first amendment constitutional proportions. If it did, there would be a constant intrusion of the judiciary into the internal affairs of the school. Academic freedom is scarcely fostered by the intrusion of three or even nine federal jurists making curriculum or library choices for the community of scholars. When the court has intervened, the circumstances have been rare and extreme and the issues presented totally distinct from those we have here. See developments in the Law—Academic Freedom. 81 Harv.L.Rev. 1045, 1051-54 (1968). . . . Here, patently we have no religious establishment or free exercise question, and neither do we have the banning of the teaching of any theory or doctrine. The problems of the youth in the ghetto, crime, drugs and violence have not been placed off limits by the Board. A book has been removed but the librarian has not been penalized, and the teacher is still free to discuss the Barrio and its problems in the classroom. . . . The intrusion of the Board here upon any first amendment constitutional right of any category of plaintiffs is not only not "sharp" or "direct", it is minuscule. 457 F.2d at 292.

In *East Hartford Education Association et al. v. Board of Education,* 562 F.2d 838, 857, (2nd Cir. 1977) (en banc), we upheld a school board's right to enforce a dress code requirement for teachers, stating:

> Federal courts must refrain, in most instances, from interfering with the decision of school authorities. Even though decisions may appear foolish or unwise, a federal court may not overturn them unless the standard set forth in *Epperson* is met. The Supreme Court recently emphasized this point in *Wood v. Strickland,* 420 U.S. 308, 95 S. Ct. 992, 43 L.Ed.2d 214 (1975), in which a high school's summary disciplinary proceedings were challenged on due process grounds:
>
> It is not the role of the federal courts to set aside decisions of schools administrators which the court may view as lacking a basis in wisdom or compassion. . . . The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members, and § 1983 was not intended to be a vehicle for federal-court corrections of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees.

Id. at 326, 95 S.Ct. at 1003 (citations omitted). Similarly in *Eisner v. Stamford Board of Education,* 440 F.2d 803 (2nd Cir. 1971) we recognized that school authorities may adopt a policy prohibiting distribution of literature on school property without prior permission from the school administration and in *Trachtman v. Anker,* 563 F.2d 512 (2nd Cir. 1977), *cert. denied,*

435 U.S. 925 (1978) we upheld school officials' refusal to allow distribution within the school of a sexually explicit questionnaire prepared by a student group.

Prohibiting exposure of children to indecent language has been upheld by the Supreme Court not only on school premises but in other locations as well, even where the unique demands of the educational process did not play a part. In *Ginsberg v. New York*, 390 U.S. 629 (1968), for instance, the Court held that the State of New York could constitutionally prohibit the sale to minors under 17 years of sex magazines that would not be obscene for adults, based on the state's interest in protecting the children's welfare and safeguarding them from abuses. And in *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978), the Court upheld the FCC's authority to impose administrative sanctions on broadcasting of indecent language. In his plurality opinion Justice Stevens based the decision not only on the ground that the ideas expressed in indecent language could have been conveyed by less offensive language but also on the ground that the government had a proper interest in protecting minors from exposure to indecencies. 438 U.S. at 749-50. As we said in *Thomas, supra*, 607 F.2d at 1057 (Newman, J., concurring),

> When, as in this case, the audience at which a publication is specifically directed consists solely of high school students, and distribution is demanded at a school building attended by students down to the age of 11, First Amendment protection is not available for language that is indisputably indecent. If the F.C.C. can act to keep indecent language off the afternoon airwaves, a school can

act to keep indecent language from circulating on high school grounds.

Application of the foregoing principles mandates an affirmance of the Board's action in the present case. Whatever may be a judge's personal view as to the wisdom of its decision, the Board acted on rational and specific grounds relevant to the education and welfare of the school children within its jurisdiction, and it did so fairly and conscientiously. It discontinued the handful of books because all but one contain either vulgar and indecent language, profanities, explicit sex, sexual perversion, poor grammar, glorification of sex and drugs, or anti-Jewish, anti-Black, or anti-Christian remarks.[6] In the Board's view the books lacked sufficient redeeming value to outweigh the threatened harm from the objectionable portions.

The Board's action does not hinder or destroy anybody's rights of free expression. The Board did not seek to inculcate students with any particular social or political views (e.g., legalized abortion or anti-abortion, adherence to the views of any political party or religion,

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6 *A Reader for Writers*, an anthology edited by Jerome W. Archer and Joseph Schwartz, while not apparently containing vulgar or indecent language, does contain a story which members of the Board considered to be in sufficiently bad taste to justify its removal from the library. An article in the book by Jonathan Swift, entitled *A Modest Proposal for Preventing the Children of Poor People in Ireland From Being a Burden to their Parents or Country*, suggests at length that the overpopulation problem could be solved by having 100,000 one-year old children slaughtered and served as food, with the skins to be artificially dressed and made into gloves and boots, and describes the proposed process in detail. I cannot label the Board's decision to discontinue the book as irrational or designed to suppress freedom of expression by students, particularly in the absence of evidence that the book was in demand for any of its other writings.

promotion of the Equal Rights Amendment or the like). No free exchange of ideas was suppressed. No one was imposing views, whether labelled "orthodox" or otherwise, on anybody else. No one has been or will be disciplined as a result of the removal of the books. Nor will anyone be denied an education in line with basic community values.[7] Both parties agree that teachers and students are free to discuss and comment on the themes and ideas of the books in class or on school premises.[8] Students may also be able to purchase the books outside of school or borrow them from a public library. In short there are no First Amendment or other constitutional interests at stake, because, as the Seventh Circuit said in *Zykan*:

> the rule [is] that complaints filed by secondary school students to contest the educational decisions of local authorities are sometimes cognizable but

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7 Community values may not be underestimated as a factor to be taken into account by a Board in selecting those books suitable for the part to be played by a school library in performance of the school's educational function. According to the Eighth Annual Gallup Poll of the Public Attitude toward the Public Schools, as reported in *Phi Delta Kappa* Magazine for October 1976 (which was during the period of the events in question in this case), most persons answered that "high moral standards" represented the quality most neglected by public schools in the overall development of children. Seven out of ten parents replied that schools should share with them the responsibility for the moral behavior of their children.

8 The parties' statements of facts, about which no dispute exists, filed pursuant to Rule 9(g) of the General Rules of the Southern District of New York, contain the following pertinent provisions:

Plaintiffs: "Although the books themselves were excluded from use in the schools in any way, defendants have not precluded discussion about the themes of the books or the books themselves.

Defendants: "No teacher has been instructed not to discuss the books which were removed or to refrain from discussion or comment upon the ideas and positions they represent."

> generally must cross a relatively high threshold before entering upon the field of a constitutional claim suitable for federal court litigation. Such a balance of legal interests means that panels such as the Warsaw School Board will be permitted to make even ill advised and imprudent decisions without the risk of judicial interference. Nothing in these principles suggests that the courts should condone short-sighted board decision-making. But nothing in the Constitution permits the courts to interfere with local educational discretion until local authorities begin to substitute rigid and exclusive indoctrination for the mere exercise of their prerogative to make pedagogic choices regarding matters of legitimate dispute. Slip Op. at 11.

Here we do not find any effort by school authorities to suppress speech or ideas on the part of teachers or pupils or to force them to "speak" against their will, such as existed in *Tinker, Epperson, West Virginia State Board of Education, Keyishian, James, Thomas* and *Eisner, supra,* or any ban on teaching or expressing certain views essential to a basic education, such as occurred in *Epperson, supra* (theory of evolution) and *Meyer v. Nebraska,* 262 U.S. 390 (1922) (statute prohibiting teaching of any foreign language to grades lower than the eighth). The handful of books discontinued by the Board leaves on the school's shelves hundreds of volumes for the students' edification and learning. The action therefore does not create any "pall of orthodoxy" or impermissible indoctrination such as might exist if exchange of ideas between teachers and pupils were prohibited. The ideas expressed in the

removed books may also be freely discussed, in or out of the classroom, without using the profanities, vulgarities, and indecencies objected to by the Board. As Justice Stevens stated in *FCC v. Pacifica Foundation, supra,* 438 U.S. at 743, n.18: "A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language."

For these reasons, I find no constitutional infringement of individual rights of anyone in the removal of a handful of books containing indecent expressions. As Judge Mulligan pointed out in *Presidents Council, supra,* 457 F.2d 293:

> There is here no problem of freedom of speech or the expression of opinions on the part of parents, teachers, students or librarians. As we have pointed out, the discussion of the book or the problems which it encompasses or the ideas it espouses have not been prohibited by the Board's action in removing the book.

The same may be said of the present case. There is no legally significant distinction between this case and *Presidents Council, supra,* where we held that the removal from the school library by school authorities of a book containing vulgar language and explicit sexual allusions did not sharply and directly infringe upon freedom of speech and thought within the meaning of *Epperson.* That holding represents the law of this Circuit, by which we are bound. The suggestion that *Presidents Council* may be distinguished on the ground that in the present case eight of the school's hundreds

of books were withdrawn (2 of the original 10 were continued) instead of the one in that case is unpersuasive, absent some evidence of inhibition of free expression within the school, of which there is none. Even assuming a First Amendment interest in gaining general access to the information in instructional material, the loss here is *de minimis*.

Nor has *Presidents Council* been weakened in any way by the Supreme Court's later decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), which upheld the right to receive information as the "reciprocal right of the speaker." Here no speaker exists claiming a constitutional right to address the students with respect to the text of the removed books unless it is the teachers, who are not prevented from speaking on the subject matter. The publishers and authors of the books do not claim any constitutional right mandating use of their books in the school. The only persons having the right to choose the books are the members of the Board, who have made their decision on rational grounds. Since under *Virginia State Board* the right of students to receive information is no greater than that of the speaker to furnish it, the decision has no application to the facts of this case.

The reasons advanced by Judges Sifton and Newman for not following *Presidents Council* are curious, vague and unsupported by the record. At one point Judge Sifton states (p. 19) that the Board's discontinuance of the eight books was impermissible as "an unusual and irregular intervention in the school libraries' operations by persons not routinely concerned with their contents." The simple answer is that § 1709 of the New York Education Law expressly imposes a duty on the

Board to be concerned with the books to be used by school children within its jurisdiction,—indeed, to prescribe those books. At another point (p. 19) he suggests that the Board's action was ambiguous, overbroad, or indefinite, and that a board may not act without an adequate definition of the "scope" of its action. But here the action was specific, being limited to 8 books, and the scope of and reasons for the action have been clearly explained. The Board acted because of the patently indecent matter in almost all of the books, quoted above in Footnote 1. It is difficult to conceive of a more specific description of the scope and basis of the action at issue. At still another point (p. 23) it is suggested that the book removal was improperly motivated, expressing "an official policy with regard to God and country of uncertain and indefinite content," whatever this means. But the undisputed evidence of the motivation for the Board's action was the perfectly permissible ground that the books were indecent, in bad taste, and unsuitable for educational purposes. If by "official policy" Judge Sifton means an expression of community values, we have recognized this as a valid ground for action by school authorities. *James v. Board of Education, supra,* 461 F.2d at 573; see also, *Zykan, supra,* Slip Op. at 10.

In an apparent shift of tactics Judge Sifton next concedes (p. 25) that "[c]ourts cannot prohibit and, indeed, should encourage, within limits, the thoughtful application [by school authorities] of personal standards of taste and morality and of political belief in the performance of governmental functions" but that the action here must nevertheless be condemned because of procedural irregularity, stating that the Board acted in an "erratic, arbitrary and free-wheeling manner" which

lacked "precision of regulation" (p. 23). The record here is wholly to the contrary. From the outset the Board made clear that its investigation into the educational suitability of the books was prompted by the excerpts of indecent matter quoted in Footnote 1. The initial transfer of the books from the school library to the Board Room was solely for the purpose of review to determine whether the books should be discontinued.

Nor do I find support in the record for Judge Sifton's statements that there was "confusion" and "incoherence" on the part of the Board as to the reasons the books were being removed, that the matter was pursued by the Board in an "informal or dilatory manner," that there was an "*ex post facto* appointment of a review committee", that there was "strong opposition of professional personnel, including the District Superintendent", and that some of the books were appropriate for educational purposes because they were written by "recognized authors". The reasons for discontinuance of the books have been clearly stated by the Board members and are supported by the text of the books themselves. There was nothing dilatory, informal or unfair about the procedure adopted for determining whether the books should be discontinued. The initial removal on March 3, 1976, was solely for the purpose of enabling the Board to read and review the books, and did not represent a discontinuance of them as part of the curriculum. The period required to enable the 7-person Board and the 8-person Committee to read the few available copies and for the Board to reach a final decision with respect to the educational suitability of the books was reasonable. There is no evidence that during this period any faculty or students needed the books for educational purposes. Indeed, for at least a

month and a half of the period New York public schools were not in session.

Nor was the appointment of the Committee "*ex post facto.*" Although some Board members, after reading some of the books, had expressed the view that the books were inappropriate, the Board did not make a final decision until July 28, 1976, at which time it demonstrated its open-mindedness by deciding that two volumes, *Laughing Boy* and *Black Boy,* should be retained as part of the curriculum and at least three Board members, including Vice-President Martin, changed their initially expressed views as to others. There was nothing irrational about the Board's refusal to accept some of the Committee's recommendations. The procedure by which the Board reached its decisions was eminently fair, final action being taken only after much debate, public meetings, and receipt of a report from the specially-appointed Committee. Lastly, although we may differ as to the merits of the Board's action, its rationality is manifest, being based on the text and contents of the books themselves, which the majority studiously avoids discussing. There was thus no impropriety in the procedures used by the Board to reach its decision.

For several reasons I cannot agree with Judge Newman's view that the case should be remanded for a trial to determine whether the Board's action was a "politically motivated effort to suppress ideas". In the first place, the term "politically motivated" is amorphous. If this phrase means a desire to implement the Board's conservative philosophy with respect to educational policies in the choice of books for the school's library, there is nothing constitutionally impermissible about the Board's adopting such a view, which

apparently accords with the views of the community of the Island Trees Union Free School District. *Zykan, supra,* Slip Op. at 10. Those who disagree may avail themselves of democratic election processes, which they apparently have done without success. The evidence, moreover, is clear that the injection of the "book issue" into the election of Board members and teacher labor disputes was not initiated by the Board but by the media and persons who disagreed with the Board's policy. For a federal court to inject itself into this type of local imbroglio is in my view unwise.

The important fact is not whether the Board's decision was "politically" motivated, whatever that means, but whether the discontinuance of the eight books threatens to suppress any discussion of ideas by students or teachers. On this issue the evidence is overwhelming, if not conclusive, that no ideas are being suppressed. Removal of a few books and denial of self-expression by a student body are separate concepts. Both sides agree that students and teachers remain free to discuss the ideas in the books.

Even if the Board's motivation were a factor, and I doubt whether it plays any material role in this case, the quoted texts from the books, the Board's contemporaneous expressions, and the later affidavits of its members, none of which were refuted as required by Rule 56(e), F.R.Civ.P.,[9] demonstrate beyond cavil that

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9 As we recently reiterated in *SEC v. Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978):

> "Rule 56(e) provides that when a motion for summary judgment is supported by the documents listed in Rule 56(c)—depositions, affidavits, answers to interrogatories, and admissions—an adverse party may not rest upon mere conclusory allegations or denials. The party opposing the motion must set forth 'concrete particulars' [citation omitted] . . . It is not sufficient merely to

the Board acted on rational grounds and not with the purpose of suppressing any ideas.

Appellants' reliance on *Minarcini v. Strongsville City School District*, 541 F.2d 577 (6th Cir. 1976), which refused to follow *Presidents' Council*, is misplaced. To the extent that *Minarcini* relied on the intervening Supreme Court decision in *Virginia State Board of Pharmacy, supra*, I have noted that since the publishers and authors of the removed books have and can claim no constitutional right to maintenance of their books in the School library, no reciprocal *Virginia State Board* right on the part of students to receive the books exists and that decision does not apply here. Moreover, the *Minarcini* court's reasoning that, although a school board may lawfully refuse to *acquire* a book for a school library it may not *remove* a book once acquired, is logically flawed. If a school board has the right to select a book to be placed on school library shelves, and neither of my brothers question that right, it has an equal right to remove them. As Judge Mulligan aptly stated in *President's Council*, "the concept of a book acquiring tenure by shelving is indeed novel and unsupportable under any theory of constitutional law we can discover", 457 F.2d at 293. Accord, *Zykan, supra*, Slip Op. at 15. A school board may remove a book upon rationally concluding that it made a mistake in acquiring the book in the first place.

In short, the First Amendment entitles students to reasonable freedom of expression but not to freedom

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assert a conclusion without supplying supporting arguments or facts in opposition to the motion."

See also, *Donnelly v. Guion*, 467 F.2d 290, 291 (2d Cir. 1972); *Applegate v. Top Associates, Inc.*, 425 F.2d 92, 96 (2d Cir. 1970).

from what some may consider to be excessively moralistic or conservative selection by school authorities of library books to be used as educational tools. A secondary school authority's regulatory function includes the power to refuse to continue in the school's library collection books that are rationally found unsuitable for educational purpose. This action does not violate any First Amendment rights of the student body. I would therefore affirm Judge Pratt's decision.

NEWMAN, *Circuit Judge,* concurring in the result:

The use of governmental power to condemn a book touches the central nervous system of the First Amendment. The core value of the First Amendment is the free expression of ideas. Books communicate ideas, more permanently and often more persuasively than any other form of expression. Perhaps no single event has more evocative power to signal the suppression of free speech than the burning of a book. If this case involved governmental prohibition of a book because of its political content, there is no doubt the panel would be unanimous in finding a First Amendment violation. But the case is not so simple. It involves books, and governmental power is alleged to have been motivated at least in part by the political content of the books. But the governmental action is not prohibition, it is removal from one location—a school library. And the action is sought to be justified by the acknowledged power of school authorities to make decisions concerning the education of children. Not surprisingly, a case of this sort elicits differing judicial responses. Judge Sifton would decide the case in favor of the plaintiffs. Judge Mansfield would decide the case in favor of the

defendants. In my view the case presents a sufficient claim of constitutional violation, but requires a trial to determine whether the claim is supported by the facts.

Applying First Amendment principles in the context of public schools is a subtle and complex endeavor. Neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969), but it is equally clear that the school context profoundly affects the nature of their rights. It must be recognized that schools are specialized environments devoted to the inculcation of both knowledge and social values in children, that our society has made a political decision to grant its public school authorities considerable discretion in determining how that educational process is to occur, and that such a process, by its very nature, involves informal, day-to-day relationships that are normally inappropriate for legal supervision. It is not a First Amendment violation every time a teacher tells a student not to speak, nor does a school administrator violate the First Amendment every time he includes one subject in the educational curriculum and excludes another. The school library is also subject to broad control by school authorities; as a general matter, they may decide how the library should be administered, which books should be acquired, and which books should be removed.

The plenary power of school officials transgresses First Amendment limits, however, when their actions tend to suppress ideas. It is one thing to teach, to urge the correctness of a point of view.[1] But it is quite

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1 This Court has even acknowledged that "a principal function of all elementary and secondary education is indoctrinative." *James v.*

another to take any action that condemns an idea, that places it beyond the pale of free discussion and scrutiny. Teaching implies that the strengths and weaknesses of ideas will be closely examined. Some will be favored, others criticized. This is the academic freedom that has its own strong claim to First Amendment protection. See *Epperson v. Arkansas*, 393 U.S. 97, 116 (1968) (Stewart, Jr., concurring); *Wilson v. Chancellor*, 418 F. Supp. 1358 (D. Ore. 1976); *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970); *cf. Sweezy v. New Hampshire*, 354 U.S. 234 (1975) (university level). But the First Amendment does not permit the freedom of the teacher to become an instrument for suppression of the thoughts of the students. Nor may any school official take action that tends to suppress ideas within the school community. Teachers and students alike have a right to freedom from "a pall of orthodoxy." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); see *Cary v. Board of Education*, 427 F. Supp. 945, 956 (D. Colo. 1977).

The suppression of ideas against which the First Amendment protects need not be manifested by action taken directly against a student, see *Tinker v. Des Moines Independent School District, supra*, or a

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Board of Education, 461 F.2d 566, 573 (2d Cir. 1972). It is clear from the context of this statement that it was simply intended to describe the school's role in transmitting values. As the Court said, "The interest of the state in promoting the efficient operation of its schools extends beyond merely securing an orderly classroom. . . . Accordingly, courts consistently have affirmed that curriculum controls belong to the political process and local school authorities." *Ibid. James* pointedly condemns "indoctrination" in the sense of endeavoring to insist that one set of values must be accepted by the students. *Ibid.* There is no suggestion in *James*, or in any other federal case, that the power of school officials extends beyond curriculum control to the suppression of ideas.

teacher, *Keyishian v. Board of Regents, supra; Sweezy v. New Hampshires, supra.* Prohibiting expression of views is obviously the most obnoxious violation of the First Amendment, and regulation that only restricts free expression merits the most careful scrutiny. In an open society like our own, acts of disapproval by public authorities, unaccompanied by any imposed or threatened sanctions, will generally not create sufficient risk of suppressing ideas to warrant judicial intervention. Consequently, claims of this sort have rarely been raised.[2] In the school setting, however, where a group of relatively "impressionable children," *James v. Board of Education, supra,* are compelled to attend and pay attention, official action carries an undue risk of suppressing ideas. Those in a school community have a right to be free not only from prohibition and unwarranted regulation of expression. They have a right to be free from official conduct that tends to suppress ideas—conduct conveying the message that some idea or viewpoint is not merely unsound, but is not acceptable to be aired within the school community.[3] First Amendment values are not only precious;

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2 Another reason why such indirect claims have not been frequently raised is that most actions infringing on free speech are taken against the speaker himself, who generally makes a direct claim that his First Amendment rights are violated. In situations like the present case, however, where an isolated book removal limits the free expression of the author so slightly that he makes no claim on his own behalf, the impact of the government's action on those indirectly affected by it comes to the forefront.

3 The crucial role of open inquiry in public schools has been increasingly recognized in recent years. *See Keefe v. Geanakos,* 418 F.2d 359 (1st Cir. 1969) (teacher may not be dismissed for assigning serious magazine article containing single vulgar word); *Cary v. Board of Education, supra,* (school may not exercise unlimited control over teachers); *Parducci v. Rutland, supra* (teacher may not be dismissed for assigning non-vulgar short story); *Citizens for*

they are fragile. In the context of this case they are easily threatened by inhibiting action that stops short of prohibition or restrictive regulation.[4]

Of course actions of school officials tending to suppress ideas must be sufficiently specific and serious to trigger First Amendment inquiry. *Cf. Aebisher v. Ryan*, ____ F. 2d ____ (2d Cir. 1980). To regard every disapproving comment as a potential First Amendment violation would unduly intrude upon the prerogatives of the school authorities. A different situation is presented, however, when school authorities take clearly defined and carefully planned action to condemn an idea, especially when such action is taken with respect

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Parental Rights v. San Mateo School Board, 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (1975) (First Amendment considerations opposed to effort by parents to exclude particular material from school curriculum). *See*, generally, Project, *Education and the Law: State Interests and Individual Rights*, 74 Mich. L. Rev. 1373, 1433-42 (1976); *Developments in the Law—Academic Freedom*, 81 Harv. L. Rev. 1045, 1112-13 (1968).

4 A related principle is illustrated by those cases, discussed in Judge Sifton's opinion, that have invalidated laws granting public authorities broad discretion to punish speech. *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Eisner v. Stamford Board of Education*, 440 F.2d 803 (2d cir. 1971). Judge Sifton finds this broad discretion, and the lack of precisely drawn rules for determining which books are to be permitted in the school library, sufficient to invalidate the School Board's action. In my view, this case cannot be decided on this basis. Cases such as *Shuttlesworth* and *Eisner* involved punishment imposed for certain types of speech. The vice of granting board discretion in this context is that it will have a chilling effect on all speakers; those whose speech is protected will be uncertain whether they can be punished, and will consequently hesitate to speak. In this case, however, no punishment was imposed, and there is nothing to indicate that the removal of the books carried any threat of future punishment. The connection between the action of the school and the exercise of First Amendment rights is not so direct, and the case thus requires a more detailed inquiry into the sufficiency of the threatened impact of the Board's action on the students.

to an entire school or school district. The implication of such action is unmistakable, and its inhibiting effect is likely to be significant.

The removal of a book from a school library will often be the sort of clearly-defined, school-wide action that carries with it the potential for impermissible suppression of ideas. It is possible, of course, for removal to be a casual, insignificant decision, as when the school librarian replaces an obsolete book, or discards a rarely-used one to make shelf space available for other volumes. But the deliberate decision, taken by leading school officials, that a book is to be removed from the school library because of its ideas can hardly be placed in the same category. Actions such as these can too easily lead to suppression. They signal to the students and the teachers an official message that the ideas presented in those books are unacceptable, are wrong, and should not be discussed or considered. The chilling effect of this message on those who would express the idea is all too apparent.

The symbolic effect of a school's action in removing a book solely because of its ideas will often be more significant than the resulting limitation upon access to it. The fact that the book barred from the school library may be available elsewhere is not decisive. What is significant is that the school has used its public power to perform an act clearly indicating that the views represented by the forbidden book are unacceptable. The impact of burning a book does not depend on whether every copy is on the fire. Removing a book from a school library is a less offensive act, but it can also pose a substantial threat of suppression.[5]

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[5] Lest it be thought that book burning is an extreme event, unlikely to follow the mere removal of a book, it is worth noting the facts

The risk that removing a book from a library will communicate suppression of an idea is markedly increased when the decision to remove is politically motivated. While the mere act of singling out a certain type of speech for disapproval will often be sufficient to render the state's action impermissible, this is not necessarily true in the context of schools. The latitude properly accorded to teaching must tolerate some expressions of disapproval, not only of inappropriate conduct but even of disfavored ideas. But when the disapproval is political in nature—when exclusion of particular views is motivated by the authorities' opinion about the proper way to organize and run society in general—then it verges into impermissible suppression.

There may be motivations other than political that increase the risk that removing books will be perceived as condemning unacceptable views and thereby risk suppression of those views. But political thought is a particularly important and sensitive area. Our society depends for its choice of leaders and its basic policy decisions on the independent thinking of its citizens, and on the vitality of the marketplace of ideas, see *Abrams v. United States*, 250 U.S. 616, 630 (Holmes, J., dissenting). As the Supreme Court has stated, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Education plays a significant role in preparing students for these responsibilities of citizenship. See *Wisconsin*

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presented by the plaintiffs in *Zykan v. Warsaw Community School Corp.*, ___ F.2d ___ (7th Cir. Aug. 22, 1980). The books removed from a school library in that case were conveyed to a local senior citizens' group for a public burning. Id. at ___ (Dkt. No. 80-1038, slip op. p. 3 n.2).

v. Yoder, 406 U.S. 205, 221 (1972); *Wieman v. Updegraff,* 344 U.S. 183, 194 (1952) (Frankfurter, J., concurring). When schools are used to suppress independent thinking, rather than to encourage it, they threaten the very process they are designed to foster. Moreover, politics is an area where feelings naturally run high, and the temptation for state officials to impose their views on those within their power is too often present. Special vigilance is needed to ensure that schools are not used in this manner.

Prior to this case and *Bicknell v. Vergennes Union High School Board of Directors,* ____ F.2d ____ (2d Cir. 1980), also decided this day, at least five federal courts have considered First Amendment challenges to the removal of books from school libraries. Three of these courts have concluded that the challenged removal was unconstitutional. *Minarcini v. Strongsville City School District,* 541 F.2d 577 (6th Cir. 1976); *Salvail v. Nashua Board of Education,* 469 F. Supp. 1269 (D.N.Y. 1979); *Right to Read Defense Committee v. School Committee,* 454 F. Supp. 703 (D. Mass. 1978). A fourth case, decided by this Court, held that the challenged book removal did not violate the First Amendment. *Presidents Council, District 25 v. Community School Board No. 25,* 457 F.2d 289 (2d Cir.), *cert. denied,* 409 U.S. 998 (1972). *Presidents Council* characterized the infringement of First Amendment rights as "minuscule" on the basis of the facts of that case. *Id.* at 292. A single book had been removed because of its "obscenities and explicit sexual interludes," *id.* at 291, and no political motivation for that removal was alleged or proven. *Presidents Council* did not hold that the removal of books would not constitute a First Amendment violation if that action had the effect of

discouraging or suppressing particular political ideas. In fact, the Court explicitly noted that the case involved "no showing of a curtailment of freedom of speech or thought." *Id.* at 293. The fifth case, recently decided by the Seventh Circuit, also found no constitutional violation on the facts as pleaded, but remanded the case to afford the plaintiffs an opportunity to amend their complaint to allege that the book removal was part of an effort to remove volumes conflicting with the school board's "orthodoxy." *Zykan v. Warsaw Community School Corp.*, ____ F.2d ____, ____ (7th Cir. Aug. 22, 1980) (Dkt. No. 80-1038, slip op. p. 15). Judge Swygert concurred in the result, concluding that the complaint was already sufficient to require trial on the claim that the book removal burdened free expression because several of the books dealt with the topic of feminism. *Id.* at ____ (slip op. p. 17).

Presidents Council establishes that the act of removing a book from a school library does not, by itself, violate constitutional rights. As the Court said, the "concept of a book acquiring tenure by shelving is indeed novel and unsupportable under any theory of constitutional law we can discover." *Ibid.* The right at issue is not that of the book; it is the right of the students and other members of the school community. Their rights are impaired when books are the focal point of official action designed to suppress the ideas that the books contain. In some circumstances even the action of not acquiring a book could inhibit free expression within the school, but normally removal of a book will more likely risk an impermissibly inhibiting effect. To refuse to acquire a book merely makes that book one of innumerable others that have not been

acquired, unless, because of extraordinary attention already drawn to that book, it has been specifically barred from acquisition. On the other hand, removal singles out that book for disapproval. In addition, removal, more than failure to acquire, is likely to suggest that an impermissible political motivation may be present. There are many reasons why a book is not acquired, the most obvious being limited resources, but there are few legitimate reasons why a book, once acquired, should be removed from a library not filled to capacity. Thus book removal has an evidentiary significance for determining whether the action of school authorities has created a sufficient risk of suppressing ideas to establish a First Amendment violation.

On this view of First Amendment principles, I conclude that the judgment of the District Court granting summary judgment for the defendants must be reversed, and the matter remanded for fact-finding. The allegations of the plaintiffs, fully presented in Judge Sifton's opinion, are clearly adequate, if proved, to sustain the conclusion that the school has violated the First Amendment. It is conceded that nine books were removed from the Island Trees High School and Junior High School libraries. There is no claim that shelf space was scarce or that these books contained obsolete or disproven statements of fact. These books were singled out for disapproval. There is also no question that the removal was a positive, clearly-defined act by school authorities. By the time the books were removed, the action had become a major policy decision, and there could be little doubt in the minds of the Island Trees students about the message that the school authorities intended to communicate.

Plaintiffs rely on numerous uncontested facts to contend that the removal was designed to suppress ideas. They point to the fact that three members of the School Board, Ahrens, Martin, and Hughes, became concerned about the book issue when attending a conference sponsored by an issue-oriented education group known as PONY-U.[6] The book list distributed at this conference identifies the objectionable nature of many of the books by a number of comments on the ideas or viewpoints of the books. *A Reader for Writers,* for example, is marked for condemnation because it "equates Malcolm X, considered by many to be a traitor to this country, with the founding fathers of our country." *Soul on Ice* is described as "full of anti-American material and hate for white women." Moreover, several of the comments in the newsletter distributed by the Board and in the affidavits and depositions of Board members also indicate concern with what are portrayed as objectionable ideas.[7]

The defendants dispute any politically motivated effort to suppress ideas, contending that the books were removed because of vulgar language and explicit sexual descriptions, matters on which school authorities have

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6 The acronym signifies Parents of New York United, according to the briefs of the parties. Board member Ahrens calls the organization People of New York United.

7 In addition to the examples catalogued in Judge Sifton's opinion, mention should be made of two Board members' comments concerning the removal of *A Hero Ain't Nothing But A Sandwich.* In the book Nigeria Greene, a Black teacher in a predominantly Black school, calls her students' attention to the fact that George Washington was a slave owner. To the reader she expresses her thoughts about the irony of Washington's stature in the materials taught in the school. In their depositions, two Board members concluded that Ms. Greene's thoughts were anti-American and were one reason for removing the book.

considerable latitude. See *Thomas v. Board of Education*, 607 F.2d 1043, 1053 (2d Cir. 1979) (Newman, J., concurring); *Frison v. Franklin County Board of Education*, 596 F.2d 1192 (4th Cir. 1979); *Brubaker v. Board of Education*, 502 F.2d 973 (7th Cir. 1974), *cert. denied*, 421 U.S. 965 (1975). If at trial the defendants offer to justify the removal on this ground, the trial court must be satisfied that the school's policing of language has not exceeded even the generous First Amendment limits appropriate in the context of young students. Moreover, the bona fides of a school's claim of concern with vulgarity or sexual explicitness may be refuted by evidence that other books with similar passages were not removed. A school's effort to regulate vulgarity is not unconstitutional because it is not completely thorough, but if only isolated examples are condemned, the inference will be strengthened that vulgarity was the excuse, not the reason, for book removal whose principal, or at least partial motivation was political.

Judge Mansfield, in dissent, is confident that the Board removed the books solely in the exercise of its acknowledged power to regulate vulgar and sexually explicit materials. In the absence of a trial, I am unable from this vantage point to perform similar fact-finding as to the true motives of the Board members. However, I am satisfied that the Board Members' self-professed motives, as set forth in their affidavits, should not be accepted without a trial, especially in light of the evidence the plaintiffs have offered to submit to show that the Board members' motivation was significantly political. Indeed one basis for doubting that their motivation was solely concerned with the vulgarity and sexual explicitness is set forth in the dissenting opinion.

The books were removed, the dissent observes, because they contain "*either* vulgar and indecent language, profanities, explicit sex, sexual perversion, poor grammar, glorification of sex and drugs, *or* anti-Jewish, anti-Black, or anti-Christian remarks." *Infra,* p. 6063 (emphasis added). And, as Judge Mansfield acknowledges, the removal of *A Reader for Writers* cannot even be claimed to be attributed to any of these rather varied motives. That book, according to the dissent, was removed because of the book's bad taste in including Jonathan Swift's "A Modest Proposal," the classic satire suggesting that overpopulation and hunger among the Irish should be solved by eating 100,000 Irish children. Surely a fact issue concerning motive is created when the plaintiffs offer to prove (and defendants do not deny) that this book was originally marked for removal because the PONY-U organization objected to the book's inclusion of a different selection, the one containing laudatory comments about Malcolm X.[8]

The possibility of mixed motivation—permissible concern with vulgarity or sexual explicitness and impermissible concern with political content—could call into question the relevance of the Supreme Court's decision in *Mt. Healthy City School District Board of*

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8 Though plaintiffs have acknowledged that defendants have not precluded discussion about the removed books or the themes of the books, I do not share Judge Mansfield's confidence that no free exchange of ideas was suppressed by the Board's action. I wonder how willing members of the school community are to discuss the virtues of Malcolm X after the School Board has condemned a book listed for disapproval because it equated Malcolm X with the founding fathers of our country. Judge Mansfield finds the evidence overwhelming that no ideas are being suppressed. I prefer to assess the sufficiency of the evidence after, not before, the trial. Furthermore, the issue at trial should not be simply whether ideas have been suppressed, but whether the action taken, in light of its motivation, posed a sufficient *threat* to the suppression of ideas.

Education v. Doyle, 429 U.S. 274 (1977). *Mt. Healthy* held that an untenured teacher may be dismissed for a legitimate reason related to teaching performance, even if an impermissible reason, expression of protected speech, also entered into the decision to dismiss. This might suggest that a school's permissible reason for removal of books would suffice, even though an impermissible reason also motivated the decision. However, in many contexts the existence of an impermissible motivation renders the challenged action unlawful, even if that motivation is not exclusive. See, *e.g., Robinson v. 12 Lofts Realty, Inc.,* 610 F.2d 1032, 1042 (2d Cir. 1979) (racial discrimination); *Williams v. Matthews Co.,* 499 F.2d 819, 826 (8th Cir. 1974) (same); *NLRB v. J.P. Stevens & Co.,* 563 F.2d 8, 20 (2d Cir. 1977), *cert. denied,* 434 U.S. 1064 (1978) (union harassment); *NLRB v. Jamestown Sterling Corp.,* 211 F.2d 725 (2d Cir. 1954) (same).

The *Mt. Healthy* exception to the more traditional response to mixed motivation should not apply to a school's decision to remove library books. The *Mt. Healthy* rule was designed to avoid placing the teacher "in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." 429 U.S. at 285. That reasoning has no application to the removal of a book, which neither exercises a protected right nor can be viewed as gaining by "doing nothing." Moreover, assessing even the alleged permissible motivation for removing a book always involves some consideration of First Amendment protection, for it is that Amendment that determines how far school authorities may go in maintaining standards of decency in expression. See *Thomas v. Board of Education, supra,* 607 F.2d at

1057-58. By contrast, the sufficiency of permissible grounds for dismissing an untenured teacher may, in many instances, be assessed without any consideration of First Amendment protection. Finally, the content of a book and its manner of expression are too intimately related to be subjected to entirely separate analysis. The untenured teacher's misconduct in the classroom can be analyzed entirely separately from his out-of-school protected expression. But ideas and the language used to express them always are related. See *Cohen v. California,* 403 U.S. 15, 26 (1971). Because of that relationship First Amendment values would be imperiled if a motivation concerned with the language of a book were permitted to justify an act of suppression also motivated by the book's political content.

In this case plaintiffs have alleged that the removal of books from the Island Trees School library was motivated in part by the School Board's objection to the political views expressed in those books. The complaint further alleges that this politically motivated action was taken under circumstances that pose a threat to the free expression and exchange of ideas within the school community that is protected by the First Amendment. In opposing the defendants' motion for summary judgment, the plaintiffs have submitted substantial evidence to support their claim. A trial is required to determine precisely what happened, why it happened, and whether, in the circumstances of this case, the School Board's actions, looking forward from the time they were taken,[9] created a sufficient risk of suppress-

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9 The assessment of risk to protected freedom must be made prospectively, whether or not the risk actually resulted in suppression. This is the same approach that governs when a school asserts the authority to regulate student activity; school authorities

ing ideas to constitute a violation of the First Amendment.

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must demonstrate facts that might reasonably have led them "to forecast substantial disruption of or material interference with school activities." *Tinker v. Des Moines Independent School District, supra*, 393 U.S. at 514. The need for a prospective assessment is especially important in evaluating the risk to First Amendment freedoms. If the removal of books, under the circumstances in which it occurred, dissuaded some members of the school community from expressing views because of the message they derived from the Board's action, they may be reluctant publicly to acknowledge that they hold such views and thereby risk the Board's displeasure.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 619—September Term, 1979

(Argued February 6, 1980 Decided October 2, 1980)

Docket No. 79-7690

On Rehearing and Rehearing en banc
Decided March 3, 1981

STEVEN A. PICO, by his next friend, Frances Pico, JACQUELINE GOLD, by her next friend, Rona Gold, RUSSELL RIEGER, by his next friend, Samuel Rieger, GLENN YARRIS, by his next friend, Richard Yarris, and PAUL SOCHINSKI, by his next friend, Henry Sochinski,

Plaintiffs-Appellants,

—v.—

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26, RICHARD AHRENS, FRANK MARTIN, CHRISTINA FUSULO, PATRICK HUGHES, RICHARD MELCHERS, RICHARD MICHAELS, and LOUIS NESSIM,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellees, Board of Education, et al.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED, Judge Mansfield dissenting.

It is further noted that a poll of the judges in regular active service having been taken on the suggestion for rehearing in banc and there being no majority in favor thereof, rehearing in banc is DENIED, Judge Newman concurring in a separate opinion. Judge Mansfield dissents from denial of rehearing in banc in a separate opinion, concurred in by Judges Mulligan, Timbers, Van Graafeiland and Meskill.

NEWMAN, *Circuit Judge* (Concurring in the denial of rehearing *en banc*):

The authority of a school board to remove from school libraries vulgar and indecent materials *because* they are vulgar and indecent was upheld by this Court in *President's Council District 25 v. Community School Board*, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972), and recently reaffirmed in *Bicknell v. Vergennes Union High School Board*, ____ F.2d ____, No. 79-7676 (2d Cir. Oct. 2, 1980). This case, though involving books some of which contain vulgar and indecent passages, was remanded for trial because of factually supported allegations (not present in *President's Council* or *Bicknell*) that the

motivation for the removal and the circumstances under which it occurred posed a sufficient threat to the free expression of ideas within the school community to establish a First Amendment violation. No school board need be deterred from removing vulgar and indecent materials when it confines its concern to vulgarity and indecency. The Board of the Vergennes Union High School took such action, and the complaint against it was dismissed without a trial. On the other hand, a school board is not free to select books for removal because they contain politically unpopular ideas and then expect to avoid a trial of factually supported First Amendment claims by pointing to the existence of vulgar and indecent language in some of those books.

Since the complaint remanded for trial differs significantly from *President's Council* and *Bicknell* and since articulation of the standard for determining when politically motivated book removal violates the First Amendment, if undertaken by an *en banc* court, would be inappropriate in advance of fact-finding by the trial court, I concur in the denial of rehearing *en banc*.

MANSFIELD, *Circuit Judge* (Dissenting from denial of en banc consideration), with the concurrence of Judges Mulligan, Timbers, Van Graafeiland and Meskill:

I dissent from the court's denial of en banc consideration of this case as the result of its 5 to 5 vote on that issue.

This case raises the important question of the extent to which a public school board, acting under a

state statutory duty to prescribe books to be used in its schools, is prohibited under the Constitution from removing from a school library or curriculum books which it believes to be educationally inappropriate for the school children. More specifically, do school children have a First Amendment right to require the school board to retain on the shelves books considered by it to be unsuitable for their education? Closely allied to these questions is that of what procedure a school board is required to follow under the Constitution in deciding to remove books as educationally inappropriate.

The panel majority's views on these questions (expressed in two opinions) conflict with those expressed by the Seventh Circuit in its recent contrary decision in *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300 (7th Cir. 1980), and with our own earlier contrary decision in *President's Council District 25 v. Community School Board*, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972).

The panel majority in the present case holds (1) that a board's discontinuance of books may violate the students' First amendment rights of free speech, at least where the motives of the school board are in doubt or it is suspected that student thought may be suppressed, and (2) that where the school board's motives are questioned it bears the burden of justifying its action according to precise procedural criteria. Judge Sifton's opinion concludes that on the undisputed facts the school board defendants "failed to carry their burden of establishing that the manner, if not the motive for their actions, did not violate the first amendment" and therefore they were not entitled to summary judgment. Judge Newman, in a

separate panel concurrence, takes the view that the record raises an issue of fact for trial as to whether the board acted to suppress expression of ideas found in the removed books. However, he does not share Judge Sifton's view that the decision can be grounded on the lack of precisely drawn rules for determining which books are to be permitted in a school library.

I believe that on undisputed facts the board was constitutionally entitled to remove the books, that it observed due process procedures in removing them, that no expression of ideas was suppressed, and that nothing will be gained by a remand since Judge Sifton's view (quoted above) would virutally madate a decision for the plaintiffs. As may be seen from the excerpts of the books quoted in footnote 1 of my panel dissent, all but one of the books contain indecent matter, vulgarities, profanities, explicit descriptions of sexual relations, some perverted, or disparaging remarks about Blacks, Jews, or Christ. In unrefuted affidavits board members swore that after reading the books they discontinued them for these reasons. The board did not, as the panel majority suggests, suddenly swoop down and permanently remove the books from the school. It first moved them from the library shelves to the school's Residence Reference Room for review by the board, which obviously took some time because of the limited number of copies available for reading by the 7 board members. Before taking any final action it appointed an 8-person advisory committee to read the books and make recommendations, following which it returned one book to the library shelves, retained another for student reading on a restricted basis, and discontinued the others.

The record is undisputed that students and teachers remain free to discuss the ideas in the books, free of the indecencies and vulgarities. Plaintiffs' own statement (submitted under Local Rule 9(g)) of "facts about which no material dispute exists"[1] states that, although the removed books may not be assigned for reading, "defendants have not precluded discussion about the themes of the books or the books themselves." Defendants confirmed this in their similar statement, advising that "No teacher has been instructed not to discuss the books which were removed or to refrain for discussion or comment upon the ideas and positions they represent." The quoted texts from the books, the board's contemporaneous expressions regarding the reasons for its action, and the affidavits of its members (none of which was refuted as required by Rule 56(e), F.R.Civ.P., if plaintiffs wanted to preserve an issue in this regard, *SEC v. Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978)), make it clear that the board acted on rational grounds and without any purpose of suppressing expression of ideas.

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1 Rule 9(g) of the General Rules of the District Court for the Eastern District of New York provides:

"(g) Upon any motion for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried.

"The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

"All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party."

In short, we are not here faced with violation of the traditional right of teachers and students to express ideas within reasonable limits, see, e.g., *Tinker v. Des Moines Ind. Community School District*, 393 U.S. 503 (1969); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *James v. Bd. of Education*, 461 F.2d 566 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972); *Thomas v. Bd. of Education*, 607 F.2d 1043 (2d Cir. 1979); *Eisner v. Stamford B. of Education*, 440 F.2d 803 (2d Cir. 1971), but with the basic question of whether a board can be stymied from carrying out its statutory duty by a lawsuit questioning its motives and procedures, which would require the court rather than the school board to engage in a will-o'-the-wisp investigation of the board's motives and decide what reading curriculum is educationally appropriate for school children under the board's jurisdiction. A mere review of the excerpts from the books removed shows as a matter of common sense (and, in my view, as a matter of law) that the board's action here was justified. Although I strongly favor protecting student thought and expression as guaranteed by the First Amendment, my own reading of the books, including the excerpts quoted in my panel dissent, satisfies me that the panel majority's solicitude stretches the Constitution beyond the breaking point. If a board cannot remove these books as inappropriate, it would simply refuse to remove obviously indecent and vulgar material rather than face a trial as to its motives and procedures.

APPENDIX B-1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of March one thousand nine hundred and eighty-one.

79-7690

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STEVEN A. PICO, by his next friend, Frances Pico, ET AL.,

Plaintiffs-Appellants,

—v.—

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26, ET AL.,

Defendants-Appellees.

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It is hereby ordered that the motion made herein by counsel for the appellants for rehearing is denied. Our remand of this case for further proceedings did not adjudicate the appropriateness of class action certification, a matter that remains available for further consideration by the District Court.

WALTER R. MANSFIELD
JON O. NEWMAN
Circuit Judges
CHARLES P. SIFTON
District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Docket No. 77 C 217
Memorandum and Order

STEVEN A PICO, by his next friend, Frances Pico, et al.,

Plaintiffs,

—against—

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT et al.,

Defendants.

PRATT, J:

On January 4, 1977, plaintiffs filed this action for injunctive and declaratory relief in New York State Supreme Court alleging violation of their rights under the federal and state constitutions and 42 USC §1983. Basically, the suit challenges defendant board of education's removal of certain books from the school libraries and curriculum of the Island Trees Union Free School District.

On January 29, 1977, defendants filed their petition for removal to this court. Plaintiffs' motion to remand was denied by memorandum and order filed August 16, 1977, because this case, unlike *Presidents Council, District 25 v. Community School Board #25*, 457 F2d 289 (CA2) *cert. denied*, 409 US 998 (1972), presented substantial questions of federal constitutional law. Thereafter, plaintiffs moved for certification of this case as a class action and both sides moved for summary judgment. These are the motions now before the court.

FACTS

Both parties agree to the following facts.[1] In September, 1975, the president, vice-president and another member of the board of education (board) of the Island Trees Union Free School District attended a conference sponsored by a conservatively oriented parents group called Parents of New York United (PONY-U). There, they obtained a collection of excerpts from books which PONY-U had classified as "objectionable."

On November 7, 1975, the president and vice-president of the board searched the card catalogue of the Island Trees High School and found cards for nine of the "objectionable" books.[2] The president of the board then asked the principal of the junior high school to check his school's catalogue, which was found to contain cards for one additional "objectionable" book.[3] Subsequently, a school official discovered another "objectionable" book[4] in the curriculum of a 12th grade literature course; the board had approved its inclusion in 1972. On February 24, 1976, at a "private session" of the board, attended as well by the superintendent of schools and the principals of the junior and senior high schools, the board gave an "unofficial direction" that the objectionable books be removed.

On March 3, 1976, the president of the board issued a memorandum to the superintendent, reiterating "the board's

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[1]Both parties submitted Rule 9(g) statements in support of their motions for summary judgment. The court accepts as undisputed all facts alleged in each 9(g) statement except where the 9(g) statements conflict.

[2](1) *Slaughter House Five, by Kurt Vonnegut, Jr.* (2) *The Naked Ape,* by Desmond Morris; (3) *Down These Mean Streets,* by Piri Thomas; (4) *Best Short Stories by Negro Writers,* edited by Langston Hughes; (5) *Go Ask Alice,* Anonymous; (6) *Laughing Boy,* by Oliver LaFarge; (7) *Black Boy,* by Richard Wright; (8) *A Hero Aint Nothing But A Sandwich,* by Alice Childress; (9) *Soul On Ice,* by Eldridge Cleaver.

[3](10) *A Reader for Writers,* edited by Jerome Archer.

[4](11) *The Fixer,* by Bernard Malamud.

desire that all copies of the library books in question be removed from the libraries to the board's office ***". These eleven books were immediately removed by the superintendent[5], pending further board action, and delivered to the board's office, where board members could personally review the books.

On March 19, 1976, the board issued a press release, attached to the complaint as Exhibit A. It read:

PRESS RELEASE — March 19/76

The Board of Education finds it necessary to call this press conference because of distortions, misinformation, and the obvious attempt by the New York Daily News in a cartoon published this morning, to characterize two members of the Board as a pair of shady hoods who surreptitiously sneak into school buildings under cover of darkness to snatch library books.

It comes as no surprise to this Board of Education that it is once again the subject of attack by Teacher Union leaders, headed by Walter Compare. With the election of school board candidates just two months away, the Teachers' Union is once again attempting to discredit the Board and win the seats for two union-backed lackeys.

While at the conference, we learned of books found in schools throughout the country which were anti-American, anti-Christian, anti-Semetic (sic), and just plain filthy. Upon their return, Ahrens & Martin in early November went to the Senior High School to check the card catalog to see if any of these objectionable books were in our library. We discovered nine such books. We neither removed books, nor cards from the

[5]There is some uncertainty about the exact date of removal. The books may have been removed as early as February 25, 1976. It is clear, however, that they were not delivered to the board's office until after March 3, 1976.

card file.

At the next meeting of the Board, the entire Board discussed how to handle this situation, realizing that to make the titles of the books public might cause a sudden run on the library by the students.

The Board decided that the Principals of the Senior and Junior High Schools would be called in and be directed to gather up the books in question and bring them to the entire Board, for review. This order was carried out earlier this month. The Board is presently reviewing the contents of the books.

To date, what we have found is that the books do, in fact, contain material which is offensive to Christians, Jews, Blacks, and Americans in general. In addition, these books contain obscenities, blasphemies, brutality, and perversion beyond description.

This Board of Education wants to make it clear that we in no way are BOOK BANNERS or BOOK BURNERS. While most of us agree that these books have a place on the shelves of the public library, we all agree that these books simply DO NOT belong in school libraries, where they are so easily accessible to children whose minds are still in the formulative stage, and where their presence actually entices children to read and savor them. As U.S. Commissioner of Education, T.H. Bell, has said, "Parents have a right to expect that the schools, in their teaching approaches and their selection of instructional materials, will support the values and standards that their children are taught at home. And if the schools cannot support those values, they must at least avoid deliberate destruction of them."

We who are elected by the community, are the eyes and ears of the parents. It is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and

medical dangers.

We have some books which have been reviewed, marked, and underlined. However, if they are read in front of a television camera, the FCC would never permit it to be aired. This stuff is too strong for adult viewers, but some of our educators feel it is appropriate for child consumption.

We are sure that when most of our teachers are given the opportunity to review the material, they will side with the Board, and against the Executive Committee of their own union. When most of the parents review these books, we are confident they will back us to the hilt, grateful that we have done our job and remained as they elected us...their faithful Watchdogs.

Finally, we have the books here for your inspection. We will gladly make copies of individual pages to (sic) the UNbelievers.

BOARD OF EDUCATION
Island Trees Union Free
School District

March 19, 1976.

On March 30, 1976, the board met and ratified the already accomplished transfer of the "objectionable" books to the office of the board. At the same meeting, the board appointed four Island Trees parents along with four staff members (not including a librarian) to act as a "Book Review Committee" to make recommendations to the board on the educational suitability of the books.

In its first report to the board on April 30, 1976, the committee recommended return of one book[6] to the libraries and curriculum subject to parental approval. On July 1, 1976, the committee submitted its final report, recommend-

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[6] *The Fixer.* This book, though previously in the curriculum, was not found in the libraries.

ing that four books[7] be "retained" by the school libraries, and that two books[8] be "removed". As to the remaining four books, the members of the committee could not agree about two of them,[9] recommended that parental approval be required for access to another,[10] and took no position on the last[11] because not all the members had been able to read it.

On July 28, 1976, the board acted on the committee report, resolving that one book be returned without restriction,[12] that one book be returned with students' access conditioned on parental approval,[13] and that the remaining nine books, "be removed from elementary and secondary libraries and for use in the curriculum." Explaining the meaning of this last phrase, the president of the board stated in his deposition that these nine books should not be assigned as required, optional, or even suggested reading although the books might still be discussed in class.[14]

Besides agreeing about the occurrence of the above events, the parties substantially agree about the motivation behind the board's action. In his affidavit, the president of the board explains:

> I am basically a conservative in my general philosophy and feel that the community I represent as a

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[7] *Laughing Boy, Black Boy, Go Ask Alice,* and *Best Short Stories by Negro Writers.*

[8] *The Naked Ape, Down These Mean Streets.*

[9] *Soul On Ice* and *A Hero Aint Nothing But A Sandwich.*

[10] *Slaughter House Five.*

[11] *A Reader for Writers.*

[12] *Laughing Boy.*

[13] *Black Boy.*

[14] Whether the curriculum restrictions applied to *Black Boy*, which was put on restricted access, is unclear from the record.

school board member shares that philosophy. It is to this that I attribute my re-election on a number of occasions. I feel that it is my duty to apply my conservative principles to the decision making process in which I am involved as a board member and I have done so with regard to fiscal matters, student discipline, teacher performance, union negotiations, curriculum formation and content and other educational matters.***

My objection is to the obscenity and bad taste contained in [the books] as well as their irrelevance, in my opinion, to the basic curriculum of the district and to the values which I, as a board member and president, feel the community wishes inculcated in its youth. The whole thing has been blown out of proportion. The best way to indicate the basic reasons of the board as a whole for the actions taken is to annex various statements made by the board to the public as these events were taking place. ***A review of these materials *** will indicate that the excerpts about which we were concerned (and later the books themselves) contain every form of obscenity and sexual allusion imagineable (sic). Granted one *** also makes ridiculous disparaging remarks about Christ and one *** about Jews. This does not mean that my objection is based on religious grounds or a desire to favor or exclude one religion over another. I just plain think it is in terrible taste and irrelevant to the educational process in my district—not to mention being obscene. ***

We are the elected members of a board charged with the custody of thousands of youngsters during the school day. We stand in the shoes of their parents during that time. These students do not have the same rights to be exposed to obscenities as an adult. I will certainly not be an instrument of it. If they wish to read the "banned" books they are welcome to while not in

school as long as their parents do not object. Most of these volumes are in the public library so there are alternative sources. As long as I have the legal right to exercise my discretion in the way I have, I shall continue to do so. This is the essence of the concept of community standards and local control of school boards.

Despite the board president's opinion quoted above, defendants in their Rule 9(g) statement concede that the books are not obscene; instead they argue that the "objectionable" books are in bad taste and irrelevant to the curriculum. Defendants' reply memorandum to the brief of amicus curiae American Jewish Committee puts the point as follows:

> Amicus' memorandum states that *** the Court should intercede "when a school board, acting on the basis of its political or religious views violates these [first amendment] rights." *We agree fully. Amicus* also states that *** defendants (sic) acts were "Guided by their political views...." and *** that the decision was made "on the basis of its [the board's] political orientation." That this is not so is obvious from a reading of defendants' affidavits and the exhibits annexed thereto as well as Messrs. Ahrens' and Martin's depositions. These documents (most of which are public school records) are replete with proof that religious and political considerations were far from defendants' minds, but that *their conservative philosophy of morals and traditional values was the dominant factor.* ***
>
> Additional reference to the depositions of Frank Martin *** and Richard Ahrens *** as well as a reading of the whole of the depositions sustain the conclusion that *defendants' basic concern was morality and vulgarity and its relevance to the educational process as well as the obvious bad taste exhibited* in the volumes in question—not politics and religion.
>
> (emphasis supplied)

The pleadings and affidavits submitted by all parties and *amici* demonstrate that the board acted not on religious principles but on its conservative educational philosophy, and on its belief that the nine books removed from the school library and curriculum were irrelevant, vulgar, immoral, and in bad taste, making them educationally unsuitable for the district's junior and senior high school students. Absent any dispute over a material fact, there is nothing to prevent decision of the cross-motions for summary judgment.

ISSUES

The motions present four issues. (A) subject matter jurisdiction; (B) class certification; (C) the constitutionality of the board's action in removing or restricting access to the library books; and (D) the constitutionality of the board's action in removing the books from "use in the curriculum."

A. *Jurisdiction.*

Plaintiffs allege jurisdiction over both the school board and its members in their official capacities under 42 USC §1983 and 28 USC §1343. Defendants respond that neither the board nor its members in their official capacities are "persons" subject to suit under 42 USC §1983, because the board is a municipal corporation and its members are municipal officers, all of whom are immune from suit under §1983 under *Monroe v. Pape*, 365 US 167 (1961) and *Monell v. Department of Social Services of the City of New York*, 532 F2d 259 (CA2 1976). Since the filing of defendants' brief, *Monell* has been reversed by the Supreme Court, 98 SCt 2018 (1978). In language directly applicable here, Justice Brennan, for the majority, wrote that:

> Local governing bodies, therefore, can be sued directly under section 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to

be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision affirmatively adopted and promulgated by that body's officers.

Id. at 2036.

Since these books were removed from the Island Trees school library pursuant to a decision affirmatively adopted and promulgated by the board, the court does have subject matter jurisdiction under §1983 over the board and its individual members in their official capacities. *Id.* at footnote 55.

B. *Class Certification.*

Plaintiffs have moved for class action certification under FRCP 23(b)(2). To qualify, plaintiffs must satisfy the following requirements of FRCP 23(a) & (b)(2):

(a) One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

***

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole ***."

Plaintiffs fail to qualify in two respects. First, the claims of the named plaintiffs are not typical of the claims which might be asserted by all members of the proposed class, namely, all students in the Island Trees junior and senior high schools. The named plaintiffs and their parents who represent them as "next friends" oppose the restrictions on access to school library books, but there is reason to believe that at least some students, and perhaps even a majority of parents, in the district feel otherwise.

Second, there is no advantage to class action certification in this case. In terms of FRCP 23(b)(2), there have not been events, "making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." A disposition either way would be as effective without the procedural complexities that attend class certification. The motion for class certification is therefore denied.

C. *The Constitutionality of the Board's Action in Removing or Restricting Access to Library Books.*

It is necessary to begin by focusing the issue. The complaint alleges five separate causes of action based on the board's removal and restriction of access to library books: (1) violation of New York State Constitution Art. 1 §8, guaranteeing liberty of speech; (2) violation of the same provision insofar as it guarantees academic freedom to librarians; (3) violation of the first amendment to the United States Constitution, guaranteeing freedom of expression; (4) violation of the same amendment insofar as it guarantees academic freedom to librarians; and (5) violation of 42 USC §1983.

These five causes of action reduce to a single claim for purposes of this decision. The claims to freedom of speech and academic freedom under the New York State Constitution are governed by the same principles that apply under the first amendment to the federal constitution. *East Meadow Community Concerts Association v. Board of Ed.*

of Union Free School District No. 3, 18 NY2d 129, *on remand* 27 AD2d 819, 273 NYS2d 736, *affirmed* 19 NY2d 605 (1967). Moreover, an independent, direct cause of action under the first amendment is superfluous, since the same allegations support a cause of action for violation of first amendment rights under 42 USC §1983. *Turpin v. Maillet*, 579 F2d 152 (CA2 1978).

Finally, plaintiffs have no standing to assert the rights of librarians to academic freedom under either the New York State or federal constitutions.

> [O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.
>
> *United States v. Raines*, 362 US 17, 22 (1960).

And there is no reason to relax this bar against third-party claims here, where there is no showing that the librarians of Island Trees could not have joined this action as plaintiffs or intervenors, had they wanted to do so, and where none of the classic exceptions to the bar against third-party claims applies. Tribe, *American Constitutional Law*, §3-26.

Thus, for purposes of this decision, the five causes of action in the pleading reduce to a single cause of action under 42 USC §1983, alleging that the school board's removal of the library books violates the first amendment rights of the student plaintiffs.

To support this first amendment claim, plaintiffs lean heavily on the three most recent federal court decisions involving school board bans on library books: *Minarcini v. Strongsville City School Dist.*, 541 F2d 577 (CA 6 1976), *Right to Read Defense Committee of Chelsea v. School Committee of the City of Chelsea*, 454 F Supp 703 (D Mass 1978), and *Salvail v. Nashua Board of Education*, No. 78-401 (DCNH dated May 7, 1979). Each of these cases stuck

down school board restrictions on or removal of library books as unconstitutional, and distinguished *Presidents Council, supra,* 457 F2d 289 (CA2) *cert. denied,* 409 US 998 (1972), the only federal case to uphold similar school board restrictions on library books and the only case on point in this circuit. For reasons set forth below, this court concludes that *Presidents Council,* and not the three more recent federal cases, governs the case at bar and mandates summary judgment in favor of defendants on the issue of restrictions on library books.

In *Presidents Council,* the Second Circuit had to pass on the constitutionality of a New York City local school board's restriction on access to a single book in a junior high school. Upholding the school board, the court, through Judge Mulligan, began by noting the extensive review procedures, both administrative and judicial, available under New York law to challenge the determination of a local school board, procedures which would make it not "appropriate for this court to review either the wisdom or the efficacy of the determinations of the Board." *Id.* at 291. The court then looked for the test to be applied by a federal court in reviewing the constitutionality of school board restrictions. That test was found in *Epperson v. Arkansas,* 393 US 97 (1968):

> By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot, intervene in the resolution of conflicts which arise in the daily operations of school systems and which do not directly and sharply implicate basic constitutional values.
>
> *Id.* at 104.

Applying this standard the court found "no impingement upon any basic constitutional values." *Id.* at 291. Placing the controversy in context, Judge Mulligan noted:

Since we are dealing not with the collection of a public book store but with the library of a public junior high school, evidently some authorized person or body has to make a determination as to what the library collection will be. It is predictable that no matter what choice of books may be made by whatever segment of academe, some other person or group may well dissent. The ensuing shouts of book burning, witch hunting and violation of academic freedom hardly elevate this intramural strife to first amendment constitutional proportions. If it did, there would be a constant intrusion of the judiciary into the internal affairs of the school. Academic freedom is scarcely fostered by the intrusion of three or even nine federal jurists making curriculum or library choices for the community of scholars. When the court has intervened, the circumstances have been rare and extreme and the issues presented totally distinct from those we have here.

Id. at 291-92.

Turning specifically to the facts at hand, the Second Circuit panel concluded:

Here, patently we have no religious establishment or free exercise question, and neither do we have the banning of the teaching of any theory or doctrine. The problems of the youth in the ghetto, crime, drugs and violence have not been placed off limits by the Board. A book has been removed but the librarian has not been penalized, and the teacher is still free to discuss the Barrio and its problems in the classroom. The action of the Board does not even preclude the teacher from discussing [the restricted book] in class or from assigning it for outside reading. In those libraries which have the book, the parent can borrow it and, if he sees fit, can loan it to his child if he wishes to read it. [footnote

omitted]. The intrusion of the Board here upon any first amendment constitutional right of any category of plaintiffs is not only not "sharp" or "direct", it is miniscule.

Id. at 292.

The panel found "unsupportable under any theory of constitutional law we can discover" the concept of "a book acquiring tenure". Appellants had argued that although the board had ultimate authority in the initial selection of books for the school library, a different case was presented where the book, once shelved, is now removed. Rejecting the analogy to tenure in public employment, the court found it clear that "books which become obsolete or irrelevant or were improperly selected initially, *for whatever reason,* can be removed by the same authority which was empowered to make the selection in the first place." *Id.* at 293 (emphasis supplied).

Despite this apparently clear rejection of the concept of book tenure by the Second Circuit, plaintiffs here reassert the concept, relying on one subsequent Sixth Circuit case, *Minarcini v. Strongsville City School District, supra,* and two federal district court decisions, *Right to Read Committee of Chelsea v. School Committee of the City of Chelsea, supra,* and *Salvail v. Nashua Board of Education, supra.* Although each of these cases purports to "distinguish" *Presidents Council,* upon analysis it is clear that in both language and result they simply adopt the book tenure concept that was rejected by the Second Circuit, and hold that once a school library book has been selected and acquired, the first amendment prevents the school board from later removing it because of its content.

In *Minarcini,* the Sixth Circuit concluded that

the School Board removed the books because it found them objectionable in content and because it felt that it

had the power, unfettered by the First Amendment, to censor the school library for subject matter which the Board members found distasteful.

541 F2d at 582.

It then noted that

> Neither the State of Ohio nor the Strongsville School Board was under any federal constitutional compulsion to provide a library for the Strongsville High School or to choose any particular books. Once having created such a privilege for the benefit of its students, however, neither body could place conditions on the use of the library which were related solely to the social or political tastes of school board members.
>
> *Id.* at 582.

In reaching its conclusion that a content-based removal of a school library book infringed the students' first amendment rights, the court argued that a public school library is a valuable adjunct to classroom discussion, that removal of library books is a serious burden on such discussion and that the burden is not minimized because a book is available in sources outside the school. Referring to libraries generally, the court reminded us that "a library is a mighty resource in the free marketplace of ideas", and asserted that it is "a forum for silent speech". *Id.* at 582-83. Recognizing that it is the book's speech, not the student's, that was limited by removing a book from the library, the court drew on the "right to receive" doctrine expounded in *Virginia State Board of Planning v. Virginia Citizens Consumers Council, Inc.*, 425 US 748, and other Supreme Court cases, and concluded that the students right to receive information, their "right to know", was unconstitutionally infringed when the board removed books because of their content.

With similar reasoning the district courts in *Right to*

Read, supra and *Salvail, supra* also found to be unconstitutional content-based removal of reading material from school libraries. With all due deference to those courts and the Sixth Circuit, they do not accurately interpret the Second Circuit's holding in *Presidents Council.* It is true that a variety of considerations may affect the decision of what books to maintain in a school library at a given time. Availability of funds, shelf space and personnel are all significant, but the principal reason for selecting and keeping books is their content. Indeed, in deciding what books to place in a school library a school board not only may, but must choose on the basis of content; to do less would be to neglect their statutory duty. Yet, *Minarcini, Right to Read* and *Salvail* each would require a school board to be content-blind and act only for reasons such as space, physical obsolescence or other considerations that are "neutral" under the first amendment.

At the heart of the controversy is the constitutional role of the school board in public education. In New York control of the public schools is committed to locally elected bodies, a commitment that "requires significant public control over what is said and done in school." *East Hartford Education Assn. v. Board of Education,* 562 F2d 838, 856 (CA2, *en banc,* 1977). One of the principal functions of public education is indoctrinative, to transmit the basic values of the community. *James v. Board of Education,* 461 F2d 566, 573 (CA2 1972), *cert. den.* 409 US 1042. A constitutionally required "book tenure" principle would infringe upon an elected school board's discretion in determining what community values were to be transmitted.

Here, the Island Trees School Board removed certain books because it viewed them as vulgar and in bad taste, a removal that clearly was content-based. Whether they were correct in their evaluation of the books is not the issue. Nor is the issue whether, assuming the books to be vulgar and in bad taste, it is a wise or even desirable educational decision to sanitize the library by removing them, thereby sheltering

the students from their influence. Such issues should be decided and remedied either by the school district's voters, or by the State Commissioner of Education on an appropriate administrative appeal.

Here, the issue is whether the first amendment requires a federal court to forbid a school board from removing library books which its members find to be inconsistent with the basic values of the community that elected them. *Presidents Council* resolved that issue by holding that a book that was improperly selected "for whatever reason" could be removed "by the same authority which was empowered to make the selection in the first place." *Presidents Council* is controlling here.

Even if this court were not bound by the Second Circuit's holding, it would reach the same result. Although *Minarcini, Right to Read* and *Salvail* seek to distinguish book removal from book acquisition, the attempted distinction is not grounded in any sound constitutional principle, and inevitably would break down in actual practice. Maintenance of a school library is an ongoing process. Periodically, books are added and removed, as school officials balance considerations of cost, space, educational need, student demand and faculty interest. As already noted, within the constraints of money and space, content is the primary criterion for selection.

If, as in *Minarcini, Right to Read* and *Salvail,* a federal court must guard a book against *removal* because of its content, then how could that same court avoid passing upon a school board's content-based refusal of a student's request to *acquire* a particular book when the funds were available? Disregarding the volume of potential litigation, a court simply is not competent to decide what books are to be in a school's library. The proper agency is the school board; and it would be illogical and unrealistic to deprive a board of its most relevant criterion, content, for making that decision.

Significantly, the school board's action here involved no

religious question, either free exercise or establishment; nor was there a ban on the teaching of any theory or doctrine; nor has there been a restrictjon imposed on classroom discussion, or a penalty inflicted on any teacher or librarian. Moreover, these restrictions have denied no student the right to silent or open speech as did the restrictions in *Tinker v. Des Moines Independent Community School District*, 393 US 503 (1969); they have not directly inhibited discussion in the classroom or elsewhere in the schools; and they have focused upon no particular student or group.

The board has restricted access only to certain books which the board believed to be, in essence, vulgar. While removal of such books from a school library may, indeed in this court's view does, reflect a misguided educational philosophy, it does not constitute a sharp and direct infringement of any first amendment right.

D. *The Constitutionality of the Board's Action in Removing the Books from "Use in the Curriculum".*

Plaintiffs in this action are students. No teacher has joined in, nor do plaintiffs establish that any teacher currently desires to use any of the restricted books in the curriculum.[15] While a student may, under the "right to receive" doctrine, *Virginia State Board of Planning v. Virginia Citizens Consumers Council, Inc., supra*, have standing to present a first amendment academic freedom claim, before such a claim may be sustained there must at least be a real, not an imagined controversy. Here, plaintiffs' contention that the board's action interferes with what teachers in the district want to teach, is diffuse, speculative and factually unsupported.

---

[15]One book, *The Fixer*, was a part of the curriculum in one class, until the book was removed by the board in the spring of 1976. There is not assertion by any party that any teacher now wishes to assign this book for use inside or outside the classroom.

In the absence of a sharp, focused issue of academic freedom, the court concludes that respect for the traditional values of the community and deference to the school board's substantial control over educational content, see *East Hartford Education Assn. v. Board of Education, supra,* 562 F2d at 859, preclude any finding of a first amendment violation arising out of removal of any of the books from use in the curriculum. As the Second Circuit, *en banc,* noted in *East Hartford,* at 859:

> The very notion of public education implies substantial public control. Educational decisions must be made by someone; there is no reason to create a constitutional preference for the views of individual teachers over those of their employers.

Even less should such a constitutional preference be created for the views of students.

CONCLUSION

The challenged action by the school board did not sharply and directly implicate basic first amendment values. It fell, therefore, within the broad range of discretion constitutionally afforded to educational officials who are elected by the community.

Accordingly, defendants' motion for summary judgment is granted and plaintiffs' cross-motion for summary judgment is denied. The motion for class certification is also denied. The clerk shall enter judgment dismissing the complaint, without costs.

SO ORDERED.

Dated: Westbury, New York
August 2, 1979.

GEORGE C. PRATT
U.S. DISTRICT JUDGE

APPENDIX D

The National Law Journal Vol. 3, No. 37 (5/25/81)

National Upsurge in Textbook Cases

CENSORSHIP IN THE SCHOOLS

By Ruth Marcus
National Law Journal Staff Reporter

In Contra Costa, Calif., high school students need their parents' permission to see the school library's copy of Ms. Magazine.

In St. Anthony, Idaho, a high school English teacher was fired for using Ken Kesey's "One Flew Over the Cuckoo's Nest" as optional reading.

In Warsaw, Ind., students no longer use the textbook "Values Clarification." All 40 school copies of the book were burned.

Across the country, parents and school board members outraged by books they consider immoral, un-American or "just plain filthy" have begun new efforts to get the material they find offensive off the school library shelves and out of the curriculum—and increasingly, their battles to enforce morality are ending up in court.

This is the kind of case that makes judges yearn for complex antitrust litigation.

On one side are parents concerned about transmitting their own conservative moral, political and religious values, worried about drugs, sex and other harsh realities of modern life, and sincerely unhappy that their children are exposed to such things in school as well as on the street or the television screen.

On the other side is an amalgam of parents, students and teachers angered by attempts to cut off children's access to material they find not only acceptable, but in many cases valuable.

Complaints about school books have cropped up

sporadically over the years. But the American Library Association's Office of Intellectual Freedom reported a five-fold increase in "censorship" complaints after the conservative landslide in the November elections. And even though that upsurge has leveled off at two to three times the normal complaint level, the library group believes that the complaints it hears about represent only a tiny percentage of all book-banning fights.

Murky Line

Nearly a score of censorship cases have been heard by federal judges during the last few years, and legal experts expect that many of the current crop of complaints will end up in court as well. When they do, reluctant judges will find themselves called upon to delineate the murky line where children's First Amendment rights stop and the rights of parents and communities begin.

The U.S. Supreme Court, while it has affirmed that the First Amendment does not stop at the schoolhouse door, has never clarified exactly where it does stop, and has warned judges not to meddle in school affairs unless the contested actions "directly and sharply implicate basic constitutional values." *Epperson v. Arkansas,* 393 U.S. 97 (1968).

Not surprisingly, the difficulty of the issue has resulted in what First Amendment lawyer Floyd Abrams, in a recent paper for a school censorship litigation conference, called "stunningly different and contradictory results."

The lower federal courts that have heard school censorship cases have come up with widely different results and rationales. But the four appellate decisions in this area, though not in agreement in all respects, have tended to throw substantial barriers in the way of plaintiffs who want to keep certain books in the classrooms and libraries. *Minarcini v. Strongsville City School District,* 541 F. 2d 577 (6th Cir. 1976); *Cary v. Board of Education of the Adams-Arapahoe School District,* 598 F. 2d 535 (10th Cir. 1979); *Zykan v. Warsaw Community School Corp.,* 631

F. 2d 1300 (7th Cir. 1980); and *Pico v. Board of Education, Island Trees,* 638 F. 2d 404 (2d Cir. 1980).

The argument made by school boards and parents who believe they have the right to remove books from school libraries or classrooms is essentially this: public schools are intended to inculcate students with certain moral values as well as teach them academic fundamentals. And those values, they say, ought to be those of the people footing the bill.

"The public school was designed to reflect values and morals of the community, as well as to teach the basic skills of reading, writing and arithmetic," the National School Boards Association wrote in an amicus brief in the *Zykan* case. "The public school is not a 'free marketplace of ideas.' "

Most lawyers sharing that view agree that school boards can't eliminate entirely discussion of certain controversial issues such as communism, homosexuality or civil rights. But they argue that the boards have the authority to eliminate those books that stress values or lifestyles or language of which they disapprove.

"Unless a school board is attempting to ban doctrines of thought, they have the duty and responsibility in using their own value system in arriving at their own view of educational suitability," says George Lipp, the attorney for the school board in the *Pico* case. "And there is a safety valve for idiots who run amok and that's the election process."

Civil libertarians point out that the First Amendment was designed specifically to protect the dissemination of minority views from being squelched by a majority that disagrees with them. Certain neutral basic values — honesty, respect for governmental institutions, and the like — can be taught, they concede.

But they charge that conservatives are using "educational suitability," a judgment that should be left to teachers and librarians, to cloak an unconstitutional attempt to indoctrinate students with their own personal religious, moral

and political views and to prevent the students from being exposed to others.

"Majoritarianism has never been a basis for limiting access," says Richard Emery of the New York Civil Liberties Union, which represented the plaintiffs in the *Pico* case. "Students have First Amendment claims even in the curriculum to have exposure to ideas which are not popular ideas."

Though there is an "inherent indoctrinative effect and purpose of schools," says Mr. Abrams, those who want to exclude books they dislike are engaging in "outrageous attempts at something close to thought control" and taking a "giant step toward a much more repressive society."

But judges asked to choose between those two views must also cope with a host of even thornier questions:

- Should it be harder for boards to remove library books than those used as assigned classroom reading?
- Does a decision not to purchase a particular book—rather than a decision to ban it after it has been used in a classroom or library—also violate students' First Amendment rights?
- Does it violate the First Amendment to remove books solely because they are not to the political or social tastes of the school board, or must civil liberties plaintiffs meet the more difficult test of proving that the removal tends to suppress certain ideas?
- What about books excluded not because of the political or moral statements they make, but because of "obscene" language?
- How can courts embroiled in such cases avoid becoming "super school boards" that hear disputes every time a school chooses one textbook over another?

Courts hearing book-banning cases have addressed various mixes of these questions and answered them in different ways.

When the Strongsville, Ohio, school board removed Kurt Vonnegut's "God Bless You, Mr. Rosewater" and "Cat's

Cradle" and Joseph Heller's "Catch-22" from the school library and replaced them with biographies of Capt. Eddie Rickenbacker and Herbert Hoover and the "Reminiscences of Douglas MacArthur," the 6th Circuit distinguished between library and classroom books.

The court said the board had the authority to disregard faculty recommendations in choosing textbooks for English classes. But calling the school library "a mighty resource in the free marketplace of ideas," the court held that the board could not remove books already in the library based solely on "the social or political tastes of school board members."

The 10th Circuit agreed on the issue of controlling books in the classroom, holding that a Colorado school board had the power to ban 10 books from English courses, including: "A Clockwork Orange," "The Exorcist," "Rosemary's Baby" and works of poetry by Allen Ginsberg and Lawrence Ferlinghetti.

"The board was acting within its rights in omitting the books, even though the decision was a political one influenced by the personal views of the members," the court said.

Local Discretion?

The 7th Circuit followed a similar approach in upholding the Warsaw, Ind., school board's right to drop certain courses, including "Values for Everyone" (and its textbook, "Values Clarification") and "Women in Literature," and to ban such books as "The Stepford Wives" and "The Bell Jar" from classroom use.

"Educational decisions necessarily involve choices," the court said, "regarding what students should read and hear, and particularly in light of the formative purpose of secondary school education, local discretion thus means the freedom to form an opinion regarding the instructional content that will best transmit the basic values of the community. As a result, it is generally permissible and appropriate for local boards to make educational decisions based upon their personal, social, political and moral

values."

In *Pico*, the 2d Circuit ordered a trial in the case in order to determine whether the board's removal of books that conflicted with its admittedly conservative views was a "clearly defined, school-wide action that carries with it the potential for impermissible suppression of ideas," making no distinction between library and classroom books.

'Vulgarity and Obscenity'

Remanding the case for trial was all a majority of the three-judge panel was able to agree on. Not only did the panel produce three separate lengthy opinions, but the full court split 5 to 5 last March over a request for an en banc hearing in the case.

Twenty-one organizations filed amicus briefs in the *Pico* case, which centered on whether Island Trees, N.Y., students should be able to read "Slaughterhouse Five," "Soul On Ice" or "The Fixer" in class—or even to take them out of the library.

The same day the 2d Circuit remanded the *Pico* case, it rejected a Vermont case, *Bicknell v. Vergennes Union High School*, 638 F. 2d 438, because, it said, a school board's actions there were based on the "vulgarity and obscenity" of "Dog Day Afternoon" and "The Wanderers" rather than the ideas in them.

The furor that generated these cases isn't likely to die down, at least for the foreseeable future.

'Perverting Minds and Characters'

The Rev. Jerry Falwell, head of Moral Majority, has launched a national campaign against sex education classes. "We will not allow the liberals and humanists to twist and pervert our children's minds and characters," he warned last November. "The seeds of decadence are being sown in the public schools." The Rev. Falwell has specifically urged parents to get the book, "Our Bodies, Ourselves," out of school libraries.

State Moral Majority chapters have also taken up the cause. The Moral Majority of North Carolina, for instance,

recently issued a list of objectionable books that it believes should be removed from the schools.

In Washington state, the Moral Majority has filed suit seeking a permanent injunction against school use of "The Learning Tree" by Gordon Parks, complaining that the book "tends to inculcate the anti-God religion of humanism" and contains "swearing, profanity, obscene language, explicit descriptions of premarital sexual intercourse, explicit descriptions of other lewd behavior, blasphemies against Jesus Christ and excessive violence and murder."

(The chapter recently dropped a suit seeking to compel the state library to release the names of schools that had borrowed a sex education film, "Achieving Sexual Maturity." The suit was dropped when the chapter decided to get the information by other means.)

Numerous groups concentrating solely on the book issue have sprung up in recent years. In Longview, Texas, Mel and Norma Gabler have turned reviewing textbooks into a cottage industry, with reviews of thousands of "objectionable" or "acceptable" textbooks sent to a mailing list of more than 12,000 parents, teachers and school board members in all 50 states and 25 foreign countries.

Though they started with history texts, scouring them for feminist bias, negative attitudes toward free enterprise and preoccupation with ecology, the Gablers have expanded their horizons to everything from geology (making certain that the theory of creation is taught alongside that of evolution) to the New Math.

Chipping Away

"Once you start telling students that just because the sun has risen every morning there's no guarantee it's going to rise tomorrow morning, or teaching them bases where two plus two doesn't always equal four, the student gets confused," says Mr. Gabler. "And if the student gets confused, it's just helping a little at a time chipping away at fundamental beliefs."

Another concern of the Gablers is economics books.

"They're either Keynesian or out and out socialistic," says Mr. Gabler. "Very few of them present free enterprise, and without free enterprise you don't have a free market, and without a free market you don't have freedom."

The Gablers' work has inspired local organizations, too. The *Pico* case, for instance, got its start when school board members attended a conference of People of New York United, a school watchdog group that distributed excerpts from the books that offended them.

One new target of such groups is not individual books but entire "values clarification" courses that, they say, teach the "anti-God religion of secular humanism," leading students to question absolute values and substitute moral relativism about such issues as homosexuality, drugs, abortion and premarital sex.

Anti-ERA advocate Phyllis Schlafly has even turned the tables on those who decry censorship, urging members of her Eagle Forum to campaign against "textbook censorship of pro-family ideas" by the "ERA-NOW types" who "have been conducting a Gestapo-like censorship of textbooks to purge them of words, pictures and concepts which encourage traditional family, motherhood and ladylike behavior."

Meanwhile, numerous states have considered, or passed, laws involving books and curricula. Arkansas recently passed a law, expected to be challenged by the ACLU, requiring schools to give equal time to the theory of creation. The Oregon Civil Liberties Union is currently before the 9th Circuit fighting a law prohibiting the state from choosing history or government texts that "speak slightingly of the founders of the republic or those of who preserved the union or which belittles or undervalues their work."

The Role of Women

And in Congress, the soon-to-be introduced Family Protection Act would deny federal funding to programs that teach values clarification and to schools that do not permit parental or community review of textbooks or that use

books or other material that belittle the traditional role of women.

Ironically, however, making a fuss over such books may be counterproductive.

"The practical consequence of all this is that it's not going to work," says Notre Dame Law Professor Joseph Bauer, attorney for the plaintiffs in *Zykan.* "By making it forbidden fruit, the kids are more likely to read it."

Library Censorship Suits Multiply
The National Law Journal Vol. 3, No. 37 (5/25/81)

Book-banning efforts have graduated from schools and are now being launched against public libraries as well.

While three years ago censorship complaints involving public libraries accounted for just 10 percent of the American Library Assocation's growing file on such cases, public library problems represent 20 to 30 percent of the file today, says Henry Reichman, assistant director of the ALA's Office of Intellectual Freedom.

Some examples:

- The Rev. Richard Adams, a Baptist minister, filed a formal complaint March 17 asking the Elizabethton, Tenn., public library to remove Sidney Sheldon's "Bloodline" and Harold Robbins' "The Adventurers" and "The Inheritors" from its shelves.
- The Forsyth County Public Library in Winston-Salem, N.C., canceled a January showing of the film, "La Cage Aux Folles," because of its homosexual content.
- The Oaklawn Community Awareness Group demanded last September that a children's sex education manual, "Show Me!" — already on a special "parent's shelf" —be removed from the suburban Chicago library entirely, labeling the book "vulgar, obscene...and a threat to the community."

Sparse Case Law

The case law on standards for library censorship is sparse. "There really isn't any case law," says James Klenk of Chicago's Reuben & Proctor, which represents the Freedom to Read Foundation, the legal arm of the ALA. "Parents are concerned first and foremost with schools, and it's only later that they look at community libraries. And most of these things are dealt with before you get to court."

The only reported decision Mr. Klenk knows of is a 1976 California case, *Moore v. Younger,* 77 Cal. Rep. 1171. In that case, a California appeals court upheld a finding that the state law prohibiting the dissemination of harmful matter to children was not intended to apply to librarians.

More recently, both a federal and a state judge ordered a Utah library to reinstate librarian Jeanne Layton, who had been fired when she refused to remove a novel from the library collection. Ms. Layton has a damage suit pending against the library board, *Layton v. Swapp,* NC-79-0177J (D. Utah).

And in another case this year, the ALA found itself opposing the American Civil Liberties Union when a Virginia Beach, Va., public library stopped allowing the free distribution of a gay newspaper, Our Own, but put the paper in its regular collection.

A federal judge last January denied the ACLU's request for an injunction ordering the library to continue to allow the distribution on its premises. *Unitarian-Universalist Gay Community v. City of Virginia Beach,* 80-1037-N (E.D. Va.). The ACLU subsequently withdrew, but is reportedly considering filing a new suit on behalf of a Ku Klux Klan publication that the Virginia Beach library refused to put in its collection.

Less Justification?

Because the countervailing interest of protecting children can't be raised in library cases—at least where "problem" books are placed on restricted access—civil libertarians see even less justification for such actions.

"If freedom of expression is fully protected anywhere, it is protected in the public forum," Robert M. O'Neil wrote in a 1973 University of Cincinnati law review article. "It would be anomalous if courts were to hold that the reader has less right to receive controversial material from a public library than from a private bookstore."

Even some lawyers on the other side in school cases agree. "I'd have one heck of a time defending that [banning library books]," says George Lipp, attorney for the school board in the *Pico* case.

Office-Supreme Court, U.S.
FILED
NOV 30 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2043

IN THE

Supreme Court of the United States

October Term, 1981

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26; RICHARD AHRENS, FRANK MARTIN, CHRISTINA FASULO, PATRICK HUGHES, RICHARD MELCHERS, RICHARD MICHAELS, AND LOUIS NESSIM,

Petitioners,

—against—

STEVEN A. PICO, by his next friend, FRANCES PICO; JACQUELINE GOLD, by her next friend, RONA GOLD; RUSSELL RIEGER, by his next friend, SAMUEL RIEGER; GLENN YARRIS, by his next friend, RICHARD YARRIS and PAUL SOCHINSKI, by his next friend, HENRY SOCHINSKI,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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Petition for Writ of Certiorari Filed May 30, 1981
Certiorari Granted October 13, 1981

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DOCKET ENTRIES

28/77 — Petition for removal from Supreme Court/County of Nassau filed. (1)

7-77 — Copy of letter dtd. 2-3-77 from G. Lipp to Clerk, Nassau County Supreme Court re: petition for removal filed. (2)

18-77 — Notice of motion ret 7-28-77 at 2 PM for an order pursuant to 28 USC §1147(c) remanding this action to Supreme Court, Nassau Co. filed with memo of law. (3/4)

28-77 — Before Pratt, J. - case called - counsel present - motion to remand argued - decision reserved.

2-77 — Memorandum in opposition to motion to remand filed with affidavit of Walf Oglesby in opposition. (5/6)

16-77 — By PRATT, J. - Memo and order dtd. 8-15-77 denying motion to remand and directing the parties to appear for a status conf for 8-25-77 filed. (7)

15-77 — Before PRATT, J. - Case called for conf and counsel to make motions within 30 days.

10-17-77 — Notice of motion rte. 10-27-77 for summary judgment with affidavits of F. Martin & R. Ahrens and memo of law in support of motion filed. (8/9/10/11)

1-18-77 — Notice of examination of Frank Martin on 11-21-77 at 2 PM filed. (12)

1-18-77 — Notice of examination of Richard Ahrens on 11-21-77 at 10 AM filed. (13)

1-18-77 — Notice of motion ret 1-12-78 at 10 AM for an order

certifying this action as a class action pursuant to Rule 23(b)(2) of the FRCP filed with memo of law in support. (14/15)

11-18-77 — By Pratt, J. - memorandum and order dtd 11-18-77 adjourning oral argument for summary judgment to 1-12-78 and staying all discovery which is not needed for summary judgment motion pending decision of motion filed. Copies mailed to parties. (16)

12-19-77 — Notice of motion ret 1-12-78 at 2 PM for an order to permit American Jewish Committee to appear as amicus curiae in the action filed. (17)

1-9-78 — Notice of motion by American Library Assoc., New York Library Assoc., the Long Island School Media Assoc., Nassu Co. Library Assoc., the Suffolk Co. Library Assoc. and the Suffolk School Library Media Assoc., for leave to appear amicus curiae etc. filed. (18)

-11-78 — Defts' memo of law filed with affidavit of David S.J. Rubin. (19/20)

-16-78 — Notice of motion ret 1-26-78 at 10 AM for permission for New York State United Teachers to appear as amicus curiae filed. (21)

-16-78 — Letter dtd 1-13-78 to J. Pratt from Richard D. Emery and Alan H. Levine re plaintiffs' consent and support of motions by various organizations to participate as *amici* in the case, filed. (22)

-23-78 — Plaintiff's answering brief to defendants' motion for summary judgment and in support of plaintiffs' cross motion for summary judgment filed.

-23-78 — Notice of motion ret 2-2-78 at 2 PM for summary judgment on the grounds that no genuine issues exist as to any material fact and that plntff is entitled to a judgment as a matter of law etc. filed. (23/24)

1-30-78 — Letter dtd 1-22-77 to J. Pratt from Richard Emery and Alan Levine consenting to and supporting the American Jewish Committee's appearance as amicus curiae in the action filed. (25)

**1-25-78 — By Pratt, J. - memorandum and order dtd 1-23-78 granting the motions of the American Jewish Committee. the American Library Assoc., the New York Library Assoc., the Long Island School Media Assoc., the Nassau Co. Library Assoc., the Suffolk Co. Library Assoc. and the Suffolk School Library Media Assoc. to submit amicus curiae briefs in opposition to defts' motion for summary judgment to be filed on or before 2-1-78 filed. Copies sent to Parties. (26)

2-2-78 — By Pratt, J. - memorandum and order dtd 1-31-78 granting the motion of New York State United Teachers (NYSUT) to the extent of accepting the amicus curiae brief already filed etc. filed. Copies sent to parties. (27)

2-2-78 — Letter dated 1-11-78 to Judge Pratt from Jeffrey S. Karp re motion papers for leave for NYSUT to appear as *amicus curiae* in the case. etc. filed. (28)

2-2-78 — Before Pratt, J. - case called - counsel for both sides present - defts' motion for summary judgment and plntffs' motion for summary judgment - motions argued - decisions reserved - deft has 2 weeks to reply to amicus briefs.

2-17-78 — Reply memorandum of law to amicus curiae American Jewish Committee etc. filed. (29)

2-17-78 — Reply Memorandum of law to amicus curiae New York State United Teachers filed. (30)

2-17-78 — Transcript of examination before trial of Frank Martin dtd 11-22-77 filed. (31)

2-17-78 — Transcript of examination before trial of Richard Ahrens dtd 11-22-77 filed. (32)

2-22-78 — Memo of law of American Library Ass.. to deny defts motion for summary judgment filed. (33)

2-23-78 — Motion of National Council of Social Studies with memo of law to file amicus curiae filed. (34, 35)

3-6-78 — Letter dtd. 3-2-78 from G. Lipp to J. Pratt re: reply to points raised by opposing counsel filed. (36)

3-6-78 — Letter dtd. 3-2-78 from G. Lipp to J. Pratt re: reply to points raised by opposing counsel filed. (36)

3-6-78 — Leter dtd. 3-2-78 from G. Lipp to J. Pratt re: reply to brief of American Library Associa.. filed. (37)

3-6-78 — Memo of law of deft in reply to National Social Studies Counsel filed. (38)

3-13-78 — Letter dtd 3-8-78 to J. Pratt from Alan Levine re plntffs' revised 9(g) statement filed with the revised 9(g) statement annexed. (39)

4-4-78 — Revised 9(g) statement filed. (40)

6-15-78 — Defts memorandum of law filed. (41)

6-15-78 — Affidavit of David Rubin filed. (42)

8-8-78 — Citation of supplemental authority filed sg. (43)

11-3-78 — Affidavit of service of Citation of Supplemental Authority filed. (44)

VERIFIED COMPLAINT

Index No. ____

CLASS ACTION

SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

Steven A. Pico, et al. *v.* Board of Education, et al.

I. Introduction

1. This is a class action for injunctive relief on behalf of all students in the public junior high school and the public senior high school in the Island Trees Union Free School District No. 26 (hereinafter "District"). They challenge on state and federal constitutional grounds resolutions of the defendant school board ordering the removal of nine books from all of the school libraries in the District and prohibiting teachers from using these books in the curriculum. In addition to their own rights, plaintiffs assert the academic freedom rights of librarians and teachers in the District.

II. Parties

2. Plaintiffs Steven A. Pico, Jacqueline Gold, Glenn Yarris, and Russell Rieger, minors who sue by their next friends, are students at Island Trees High School, and Paul Sochinski, a minor who sues by his next friend, is a student at Island Trees Memorial Junior High School.

3. Defendant Board of Education, Island Trees Union Free School District No. 26, is the duly elected Board of Education of the District. The Board is a state agency charged with over-all responsibility for the operation and administration of the public schools within the District.

4. Defendant Richard Ahrens is President of the Board of Education of the District.

5. Defendant Frank Martin is the Vice-President of the Board of Education of the District.

6. Defendants Christina Fasulo, Patrick Hughes, Richard Melchers, Richard Michaels, and Louis Nessim are members of the Board of Education of the District.

Class Action Allegations

7. Plaintiffs bring this action pursuant to Section 901 of the Civil Practice Law and Rules on behalf of persons similarly situated, namely all students in the public junior and senior high schools in the District. This class is so numerous that joinder of all members is impracticable; there are questions of law or fact common to the class which predominate over any questions affecting only individual members; the claims of the named plaintiffs are typical of the claims of the class; and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

8. The plaintiffs will fairly and adequately protect the interests of the class. Plaintiffs are represented by attorneys associated with the New York Civil Liberties Union, a privately funded organization with experience in the area of constitutional litigation and sufficient resources to continue this action to its conclusion.

III. Incidents at Issue

9. Both Island Trees High School and Island Trees Memorial Junior High School maintain libraries for the use of students

within each school. The books in each library are available for reading by students at various times during the school day and the books may, in addition, be borrowed for up to 14 days with a one-time renewal of 14 days.

10. On March 3, 1976 defendant Ahrens, in a memorandum to Dr. Richard G. Morrow, then Superintendent of the District, expressed the "desire" of the Board of Education that all copies of certain books "be removed from the libraries to the board's office..." The books to which he referred were: *The Fixer*, by Bernard Malamud; *Slaughterhouse Five*, by Kurt Vonnegut; *The Naked Ape*, by Desmond Morris; *Down These Mean Streets*, by Piri Thomas; *Best Short Stories by Negro Writers*, edited by Langston Hughes; *Go Ask Alice*, (anon.); *A Hero Ain't Nothing But A Sandwich*, by Alice Childress; *A Reader for Writers*, edited by Jerome Archer; *Black Boy*, by Richard Wright; and *Laughing Boy*, by Oliver LaFarge. *A Reader for Writers* was the only title in the junior high school alone, and *Laughing Boy* was the only title in both junior and senior high schools. The remaining books were only in the senior high school.

11. According to a Board of Education Press Release (annexed hereto as Exhibit A), each of these titles had come to the Board's attention as a result of attendance by three board members, defendants Ahrens, Hughes and Martin, at a September 1975 conference sponsored by a group called Parents of New York United. Ahrens, Hughes and Martin were advised at the conference that various "anti-American, anti-Christian, anti-Semitic, and just plain filthy" books were in use in schools throughout the country. Upon their return from the conference, they found that ten such books—those referred to in defendant Ahrens' March 3 memorandum—were in the District's school libraries. Subsequently, an eleventh book, *Soul On Ice*, by Eldridge Cleaver, was found to be in use in the schools.

12. At a meeting on March 30, 1976 defendant Board of Education authorized the appointment of a committee consisting of four school staff members and four parents to evaluate the "educational suitability of [the eleven] books and whether they are in good taste, appropriate and relevant."

13. On or about July 1, 1976, the Committee submitted its report, recommending that five of the books be retained in the school libraries and that three be removed. There was a tie vote on two of the books, and no recommendation was made on one, *A Reader for Writers*, because the committee was unable to obtain a copy for review.

14. At a meeting on July 28, 1976 the Board of Education considered resolutions on each of the eleven books submitted to the committee. All but two of the resolutions ordered that the book in question "be removed from the elementary and secondary libraries, and for use in the curriuculum." Of the exceptions, the resolution concerning *Black Boy* by Richard Wright, ordered that the book be returned to the library shelves on a restricted basis." The resolution concerning *Laughing Boy* by Oliver LaFarge ordered that the book be "returned to the library shelves without restriction."

15. On information and belief, defendants ordered the removal of the books from school libraries and proscribed their use in the curriculum because particular passages in the books offended their social, political and moral tastes and not because the books, taken as a whole, were lacking in educational value.

16. On information and belief, since the beginning of the 1976-77 school year in September 1976, all of the books mentioned above, with the exception of *Black Boy* and *Laughing Boy*, have been unavailable in the school libraries of the district.

17. On information and belief, since the beginning of the 1976-77 school year in September 1976, teachers and students have been prohibited from using all of the books mentioned above, with the exception of *Black Boy* and *Laughing Boy*, in their school's curriculum.

IV. Causes of Action

18. The resolutions ordering the removal of certain books from the school libraries of the District and prohibiting the use of those books in the curriculum, and the implementation of those resolutions, deny plaintiffs their rights under Article 1, Section 8 of the New York Constitution guaranteeing liberty of speech.

19. The resolutions ordering the removal of certain books from the school libraries of the District and prohibiting the use of those books in the curriculum, and the implementation of those resolutions, deny plaintiffs their rights under the First Amendment to the United States Constitution.

20. The resolutions ordering the removal of certain books from the school libraries of the District and prohibiting the use of those books in the curriculum, and the implementation of those resolutions, deny plaintiffs their rights under Section 1983 of Title 42 of the United States Code.

21. The resolutions ordering the removal of certain books from the school libraries of the District, and the removal of those books, have imposed upon librarians in the District arbitrary and unreasonable restrictions upon their ability to function as librarians in violation of principles of academic freedom established by Article 1, Section 8 of the New York Constitution and the First Amendment to the United States Constitution.

22. The resolutions prohibiting the use of certain books in the curriculum of schools in the District, and the implementation of those resolutions, have imposed upon teachers in the District arbitrary and unreasonable restrictions upon their ability to function as teachers in violation of principles of academic freedom established by Article 1, Section 8 of the New York Constitution and the First Amendment to the United States Constitution.

23. Plaintiffs have no adequate remedy at law. WHEREFORE, plaintiffs pray that this Court:

(a) Order that this action be maintained as a class action.

(b) Declare that the resolutions passed on July 28, 1976 by defendants ordering the removal of certain books from the school libraries and prohibiting the use of those books in the curriculum violate Article 1, Section 8 of the New York Constitution and the First Amendment of the United States Constitution.

(c) Grant plaintiffs a preliminary, and upon final hearing, a final injunction ordering defendants to restore said books to those school libraries in the District from which they were removed pursuant to said resolutions and restraining defendants, their agents, servants and employees and all persons in active concert with them from interfering with the use of said books in the curriculum.

(d) Grant plaintiffs' reasonable attorneys' fees and costs of this action.

(e) Grant such other and further relief as this Court deems just and proper.

Respectfully Submitted,

Alan H. Levine
New York Civil Liberties Union
84 Fifth Avenue
New York, N.Y. 10011
(212) 924-7800

Steven Hyman
Kunstler & Hyman
370 Lexington Avenue
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Nassau County Chapter
New York Civil Liberties Union
210 Old Country Road
Mineola, New York 11501
(516) 741-8520

Attorneys for Plaintiffs.

January, 1977

BOARD OF EDUCATION
ISLAND TREES UNION FREE SCHOOL DISTRICT
TOWN OF HEMPSTEAD
ISLAND TREES, LEVITTOWN, N.Y. 11756
(516) 731-4020

EXHIBIT A

PRESS RELEASE — March 19/76

The Board of Education finds it necessary to call this press conference because of distortions, misinformation, and the obvious attempt by the New York Daily News in a cartoon published this morning, to characterize two members of the Board as a pair of shady hoods who surreptitiously sneak into school buildings under cover of darkness to snatch library books.

It comes as no surprise to this Board of Education that it is once again the subject of attack by Teacher Union leaders, headed by Walter Compare. With the election of school board candidates just two months away, the Teachers' Union is once again attempting to discredit the Board and win the seats for two union-backed lackeys.

And now for the truth. In September 1975, Board members Ahrens, Hughes, and Martin attended a conference at Watkins Glen, New York, sponsored by Parents' of New York, United. The purpose of the conference was to discuss education in general, and the parents role in education in particular.

While at the conference, we learned of books found in schools throughout the country which were anti-American, anti-Christian, anti-Semitic, and just plain filthy. Upon their return, Ahrens & Martin in early November went to the Senior High

School to check the card catalog to see if any of these objectionable books were in our library. We discovered nine such books. We neither removed books, nor cards from the card file.

At the next meeting of the Board, the entire Board discussed how to handle this situation, realizing that to make the titles of the books public might cause a sudden run on the library by the students.

The Board decided that the Principals of the Senior and Junior High Schools would be called in and be directed to gather up the books in question and bring them to the entire Board, for review. This order was carried out earlier this month. The Board is presently reviewing the contents of the books.

To date, what we have found is that the books do, in fact, contain material which is offensive to Christians, Jews, Blacks, and Americans in general. In addition, these books contain obscenities, blasphemies, brutality, and perversion beyond description.

This Board of Education wants to make it clear that we in no way are BOOK BANNERS or BOOK BURNERS. While most of us agree that these books have a place on the shelves of the public library, we all agree that these books simply DO NOT belong in school libraries, where they are so easily accessible to children whose minds are still in the formulative stage, and where their presence actually entices children to read and savor them. As U.S. Commissioner of Education, T.H. Bell, has said, "Parents have a right to expect that the schools, in their teaching approaches and their selection of instructional materials, will support the values and standards that their children are taught at home. And if the schools cannot support those values, they must at least avoid deliberate destruction of them."

We who are elected by the community, are the eyes and ears of the parents. It is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical dangers.

We have some books which have been reviewed, marked, and underlined. However, if they are read in front of a television camera, the FCC would never permit it to be aired. This stuff is too strong for adult viewers, but some of our educators feel it is appropriate for child consumption.

We are sure that when most of our teachers are given the opportunity to review the material, they will side with the Board, and against the Executive Committee of their own union. When most of the parents review these books, we are confident they will back us to the hilt, grateful that we have done our job and remained as they elected us...their faithful Watchdogs.

Finally, we have the books here for your inspection. We will gladly make copies of individual pages to the UNbelievers.

BOARD OF EDUCATION
Island Trees Union Free School District

March 19, 1976

ANSWER
Index No. 22742/76

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
(Title Omitted)

Defendant, BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26, RICHARD AHRENS; FRANK MARTIN; CHRISTINA FASULO; PATRICK HUGHES; RICHARD MELCHERS; RICHARD MICHAELS; LOUIS NESSIM, by its attorney, GEORGE W. LIPP, JR., ESQ., as and for its verified Answer herein states:

FIRST: Deny each, all and every allegation contained in paragraph numbered "1." of the Complaint.

SECOND: Deny for lack of information sufficient to form a belief as to the allegations contained in paragraph numbered "2." of the Complaint except admit that plaintiff, STEVEN A. PICO, JACQUELINE GOLD, RUSSELL RIEGER and GLENN YARRIS are students at Island Trees High School and that PAUL SOCHINSKI is a student at Island Trees Memorial Junior High School.

THIRD: Deny each, all and every allegation contained in paragraph numbered "7." of the Complaint.

FOURTH: Deny each, all and every allegation contained in the first sentence of paragraph "8." of the Complaint and deny for lack of information sufficient to form a belief as to each, all and every allegation contained in the balance of paragraph "8." of the Complaint.

FIFTH: Admit that a memorandum was issued on March 3, 1976, as stated in paragraph "10." of the Complaint but deny that the quotations used therein constitute a full and complete statement of the content of such memorandum and the import thereof.

SIXTH: Admit each, all and every allegation contained in paragraph numbered "11." of the Complaint except as to the word "advised" as in the press release the word "learned" was used.

SEVENTH: Deny each, all and every allegation contained in paragraph numbered "15." of the Complaint.

EIGHTH: Deny each, all and every allegation contained in paragraph numbered "17." of the Complaint.

NINTH: Deny each, all and every allegation contained in paragraph numbered "18." of the Complaint.

TENTH: Deny each, all and every allegation contained in paragraph numbered "19." of the Complaint.

ELEVENTH: Deny each, all and every allegation contained in paragraph numbered "20." of the Complaint.

TWELFTH: Deny each, all and every allegation contained in paragraph numbered "21." of the Complaint.

THIRTEENTH: Deny each, all and every allegation contained in paragraph numbered "22." of the Complaint.

FOURTEENTH: Deny each, all and every allegation contained in paragraph numbered "23." of the Complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

FIFTEENTH: In doing the acts complained of in the Complaint herein, defendant was duly authorized by, and acted under, the authority of the provisions of Section 1701, 1709 and 1710 of the Education Law of the State of New York.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

SIXTEENTH: That the instant proceeding is totally and wholly improper in that it is brought for a declaratory judgment when in fact and in law the proceeding is in the nature of mandamus and should have been brought pursuant to the provisions of Article 78 of the Civil Practice Law and Rules of the State of New York.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

SEVENTEENTH: The cause of action alleged in the Complaint herein accrued no later than the 28th day of July, 1976, more than four months prior to the commencement of this action. Since such action is a proceeding against a body or officer, pursuant to Section 217 of the Civil Practice Law and Rules, the statute of limitations for such proceeding has expired and the claims therein are, therefore, barred at law.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

EIGHTEENTH: That the plaintiffs herein have no legal capacity to sue as a class and cannot maintain this action as a class as defined in Article 9 of the Civil Practice Law and Rules.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

NINETEENTH: Island Trees Union Free School District, No. 26, is a municipal corporation under the laws of the State of New York, is an agency of the State of New York and the members of its Board of Education are state officials and public officers under its laws. The said School District, and the members of its Board of Education are not, therefore, "persons" within the meaning of U.S.C. 42, Section 1983.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

TWENTIETH: The plaintiffs' suit is barred by failure to file a verified Notice of Claim within ninety days after the cause of action arose, all as provided for and required pursuant to Section 3813 of the New York State Education Law.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

TWENTY-FIRST: With regard to plaintiffs' allegation that defendant violated the right of the teachers to academic freedom defendant contends that such teachers failed to exhaust their administrative remedies as accorded pursuant to Article 6 - Grievance Procedure, of the Collective Bargaining Agreement between the United Teachers of Island Trees and the Board of Education, dated July 17, 1975, and covering the period July 1, 1975 to June 30, 1978, and pursuant to the regulations of such Board.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE

TWENTY-SECOND: The teachers of defendant School District or any of them, are not parties to this action and accordingly,

any claims made as contained in paragraph "22." of the Complaint relating to a violation of principles of academic freedom are unfounded and without merit.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

TWENTY-THIRD: The defendant Board members are elected public officials vested with discretionary duties by the laws of the State of New York with regard to the selection, purchase and use of curriculum and textual materials within defendant School District, which duties were exercised in good faith, without malice and upon the advice of counsel, entitling the defendant thereby to a qualified privilege of immunity.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE

TWENTY-FOURTH: By virtue of defendant's discretionary powers and the exercise thereof in good faith, without malice and in accordance with the laws of the State of New York, the plaintiffs herein are precluded from assessing reasonable attorneys fees against defendant as requested in the Complaint and such claim is not such as was contemplated within the purview of Rule 909 of the Civil Practice Law and Rules.

WHEREFORE, defendant demands judgment against the plaintiff dismissing the complaint in all respects and for such other and further relief as to this Court may seem just and proper.

Dated: January 24, 1977
Babylon, New York

GEORGE W. LIPP, JR., ESQ.
DAVID S.J. RUBIN, ESQ., Of Counsel
Attorney for Defendant
Office and P.O. Address
83 Fire Island Avenue
Babylon, New York 11702

MOTION

Civil Action File No. 77 C 217

DISTRICT COURT OF THE UNITED STATES
EASTERN DISTRICT: NEW YORK
Steven A. Pico, et al. *v.* Board of Education, et al.

Defendants move the Court to enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in the defendants' favor dismissing the action on the ground that there is no genuine issue as to any material fact and that the defendants are entitled to a judgment as a matter of law.

This motion is based upon:

a. The defendants have an absolute right pursuant to statute and case law interpretive thereof to take the action complained of herein.

b. The plaintiffs assert no cognizable constitutional or statutory interest.

c. The remedy sought herein constitutes an impermissible judicial oversight of local school district affairs.

d. The Court does not have jurisdiction of the board of education or the individual defendants in their official capacities for the purposes of a suit under 42 U.S.C. § 1983 using 28 U.S.C. (§ 1343) (3) and (4) as a jurisdictional base since the defendant board is not a "person" for such purpose.

e. The Court does not have jurisdiction of the board of edu-

cation or the individual defendants in their official capacities for the purposes of a suit under the First or Fourteenth Amendments to the Constitution of the United States using 28 U.S.C. (§ 1331) as a jurisdictional base since municipalities are immune thereunder.

f. Jurisdiction under 28 U.S.C. § 1331 does not exist since the required amount in controversy is not alleged and does not exist.

g. If plaintiffs' complaint has shown a prima facie violation of the U.S. Constitution or of 42 U.S.C. § 1983 such has been controverted by the proofs annexed hereto.

GEORGE W. LIPP, JR.
Attorney for Defendants
Office and P.O. Address
83 Fire Island Avenue
Babylon, New York
(516) 669-3720

STATEMENT PURSUANT TO LOCAL RULE 9-g

UNITED STATES DISTRICT COURT
EASTERN DISTRICT: NEW YORK
(Title Omitted)

To the District Court:

Defendants. by their attorney. GEORGE W. LIPP, JR.., in satisfaction of the requirements of local rule 9-g state that they are in

Agreement as to the Following Facts:

1. The high school and junior high school maintained and operated by them contain libraries for the use of the students.

2. The books in said libraries are available for reading and for loan.

3. On March 3. 1976 Richard Ahrens. school board president. sent a memo to the superintendent expressing "the Board's desire that all copies of the library books in question be removed from the libraries to the Board's office..."

4. Such memo referred to "Slaughterhouse-Five". "A Hero Ain't Nothing But a Sandwich". "Reader for Writers". "Go Ask Alice". The Best Short Stories by Negro Writers". "Black Boy". "Laughing Boy". "The Naked Ape" and "Down These Mean Streets".

5. Defendants Richard Ahrens. Frank Martin and Patrick Hughes had had these titles brought to their attention at a conference sponsored by Parents of New York - United.

6. Subsequent to such conference said books were found in the senior and junior high school libraries.

7. On March 30, 1976 the board appointed a committee to review the books in question and make recommendations thereon on the basis of their educational suitability, good taste, relevance and appropriateness to age and grade.

8. Such committee was comprised of four parents from the community and four staff members.

9. On July 1, 1976 said committee issued its formal report (aside from that recommending return of "The Fixer" to the curriculum on a restricted basis) recommending continued removal of some books, return of others on an unrestricted basis and of others on a restricted basis. The votes were mixed:

10. On 7/28/1976 the board formally resolved to restore some books on an unrestricted basis, to restore others on a restricted basis and to continue removal of others. The votes were mixed.

11. No teacher has been instructed not to discuss the books which were removed or to refrain from discussion or comment upon the ideas and positions they represent.

12. Obscenity of the volumes in question is not in issue.

GEORGE W. LIPP, JR.
Attorney for Defendants
Office and P.O. Address
83 Fire Island Avenue
Babylon, New York 11702

Babylon, New York
October 12, 1977.

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Docket No. 77 C 217

DISTRICT COURT OF THE UNITED STATES
EASTERN DISTRICT: NEW YORK
(Title Omitted)

STATE OF NEW YORK
COUNTY OF NASSAU ss.

RICHARD J. AHRENS, being duly sworn, deposes and says:

1. I am one of the defendants herein and am the president of the board of education of the Island Trees Union Free School District and have served in such capacity since July 1, 1974. I have been a member of such board since August 14, 1972, and make this affidavit in support of the motion for summary judgment herein.

2. I am basically a conservative in my general philosophy and feel that the community I represent as a school board member shares that philosophy. It is to this that I attribute my re-election on a number of occasions. I feel that it is my duty to apply my conservative principles to the decision making process in which I am involved as a board member and I have done so with regard to fiscal matters, student discipline, teacher performance, union negotiations, curriculum formation and content and other educational matters.

3. I was aware of a conservative organization called People of New York United (PONY-U as an acronym) comprised of parents concerned about education legislation in this state. One of its

active participants was Genevieve S. Klein, a Regent of the State of New York, whose term has recently expired and with whom I had been acquainted through various educational functions.

4. On September 19, 20 and 21, 1975 I attended an educational conference sponsored by PONY-U at Watkins Glen, New York with Frank Martin and Patrick Hughes, other members of the board of education. Numerous guest speakers made presentations including Ms. Klein, an attorney from Washington, D.C. who represented the Heritage Foundation, a conservatively oriented organization, George Archibald, a legislative assistant to Rep. John Conlon of Arizona, and other speakers with reputations in education circles who spoke about current topics about which the conservative community was concerned including litigation involving the control of text books and library books in the schools. The speaker on this topic was a Mr. Fike from Kanawa County, West Virginia which had undergone such litigation. Among the materials available at this conference were lists of books considered objectionable by some persons together with excerpts from them containing the more objectionable material.

5. Mr. Martin had apparently obtained some of these materials since, some time after the conference he mentioned to me his interest in whether our district in fact had some of the apparently objectionable materials in its library or curriculum. We attended a Winter School Night on November 7, 1976 and during the course of the evening Mr. Martin suggested that we check at the school library card index files to ascertain whether we did in fact have these volumes, or some of them, on our shelves. He had brought with him a list he had made from the materials he got at the conference. We doubted that we did have any of them. That is why we didn't ask the administrators to make the survey since we thought there would be unnecessary concern. A custodian let us into the library and we then ascertained that we had a

number (9) of the volumes regarding which Mr. Martin had obtained the materials. We didn't even see the books themselves. We did meet the principal of the school at that time and told him briefly what we were doing.

6. Having found that there were some of the materials in our library we decided to speak with other board members concerning the situation. Although I had not then read any of the books in question I was sufficiently concerned as a result of having read excerpts (See exhibit "A-1" annexed) that I felt some action had to be taken. At an executive session at a board meeting late in November, I think, we mentioned our concerns to the other board members and to the Superintendent in a rather informal manner.

7. We advised the Superintendent that it appeared based on the excerpts and the fact that Mr. Martin had read "Go Ask Alice", "Black Boy", "Soul On Ice" and "Slaughterhouse Five", that the books could well be considered objectionable and in bad taste. Mr. Martin felt quite strongly that at least those he had read were not suitable as library materials. The other board members asked for, and were given copies of the excerpts we had received at the conference. Mr. Martin asked the Superintendent to set up a meeting with the principals of the Senior and Junior High Schools to discuss how to deal with what was certain to be a controversial matter.

8. The board did not meet in December. Thereafter on February 24, 1976 during a meeting with all principals we asked the two high school principals to stay after the meeting which they did. We had a lengthy discussion with them, Irving Carroll and Ernest Valenze, during which there was much concern and wringing of hands over the potential of the situation. One principal, after reading the excerpts said "If this stuff is in the books they don't belong in the school." We had not at that time checked the

Junior High School library so we asked that principal to check it (he did so and found two more books that were on Mr. Martin's list). The principals agreed that the best way to proceed was to have the books quietly removed from the shelves and have the board read them.

9. The Superintendent was naturally quite concerned about the situation and the best method of approaching it. We had had numerous informal discussions on the matter during the intervening time. He felt a committee should study the books and recommend. I agreed but felt the board should first read them and in order to do that it had to have possession of them. He issued a statement to the board explaining his position and concerns (See exhibit "A-2"). On March 3 I found that the books had not yet been delivered to the board room so that we might have easy access to them so I sent the Superintendent a memo reminding him of our decision of February 24 (See exhibit "A-3"). Another concern of ours was if the existence of a "list" got around the books might cause a rush on them and we wouldn't be able to have them to read. (sic)

10. The books were then transmitted to the board room. At the same time the matter became public knowledge and was seized with relish by a highly antagonistic press. All hell broke loose. During this time the board members began taking and reading the individual books which were then in the board room. We also discussed the matter among ourselves informally from time to time and decided to have a committee also review the books.

11. At the public meeting of March 30. 1976 the board ratified its previous action in having the books removed to the board room and appointed an eight member committee to "read. review and make recommendations regarding the books..." The committee was to be comprised of four staff members and four parents

and were charged to recommend regarding "the educational suitability of these books and whether they are in good taste, appropriate and relevant." (See exhibit "A-4"). The latter language is from Article XIX Academic Freedom" of the teacher union negotiations contract (See exhibit "A-5").

12. As a result of the controversy surrounding our action the Superintendent saw fit to release a "Statement Concerning the Book Issue" (See Exhibit "A-6"). The "existing board policy" referred to by him therein calling for the appointment of a committee applied only to instances where a parent sought removal of allegedly objectionable material. There was and is no prescribed procedure when the board itself feels that material may be objectionable as was true in this instance.

13. During the next few days the business of selecting the members of the committee transpired. Numerous residents of the community asked to become a member (See exhibit "A-7"). At the April 16 work session the board appointed the committee which was comprised of four members of the community: Mr. Donald Ferris, former board of education member; Mr. Thomas Lane, a 1972 Island Trees High School graduate and student at Farmingdale Community College; Mr. George O'Donnell, a U.S. Post Office letter carrier and Mrs. Carol Sachs, parent and president of the PTA Council. The four staff members were Mr. Robert Amato, High School Social Studies teacher; Mr. Irving Carroll, High School Principal; Mr. Charles Lipp, High School English teacher and Mr. Richard Segerdahl, Principal and former guidance counsellor and assistant principal (See exhibit "A-8 and 8-a"). The committee received instructions to use as criteria educational suitability, good taste, relevance and appropriateness to age and grade level (See exhibit "A-4"). Those who were not appointed were thanked (See exhibit "A-9").

14. It is my firm opinion that the Committee was impartial, fair, unprejudiced and represented a cross section of the school district community. I am well aware, however that the ultimate responsibility lies with the board and that it cannot be delegated. I feel that it is important to note that the procedure used in the instant situation is very similar to that recommended by the State Education Department in its "Selection Guidelines" relating to selection of "school library resources, textbooks, instructional material" (See exhibit "A-10"). These guidelines were issued by the Board of Regents subsequent to the events related herein. Even the Regent's Guidelines (p. 8) concedes that the ultimate decision lies with the board and no distinction is made in it between library books, textbooks or other instructional materials.

15. During the ensuing months all members of the board read the books in question as did the members of the committee. The committee met on April 29, May 12, May 26, June 16 and June 30, 1976. It held its organizational meeting on April 7 and on April 30 reported to the board that it approved return of "The Fixer", the only textbook involved, to the Modern Literature curriculum subject to parental approval (See exhibit "A-11"). On May 13 the committee directed an inquiry to the board concerning the two anthologies involved (See exhibit "A-12"). On July 1 the final report of the committee was made to the board (See exhibit "A-13").

16. It is extremely important to note that the committee voted unanimously on only two of the ten books reviewed (one was unavailable and therefore not considered). Two books were recommended permanently removed from the library—"Down These Mean Streets" by 5-3 and "The Naked Ape" by 6-2. There was an even split on three of them (with a revote on one recommending it be placed on a restricted shelf). And this from the committee.

17. The board, having reviewed the committee's recommendations, and the books themselves by that time, at its regular meeting on July 28, 1976 voted separately upon each of the books covered in the committee report. The results of that vote are also important and indicative of a thoughtful exercise of discretion and judgment. One book was retained by a 7-0 vote. One was retained on a restricted basis by a 6-0 vote with one vote to retain it unrestricted, one was removed (the only textbook) by a bare majority of 4 votes with 2 votes to retain on a restricted basis and 1 vote for no restrictions, one removed by a 5-2 vote and so on (See exhibit "A-14").

18. During all of the furor surrounding these events and prior to the final committee report two of the incumbent board members ran for re-election against organized opposition. Needless to say the "book banning" issue was the major one in that campaign. Nevertheless (or more probably because of this) the incumbent members were re-elected (See exhibit "A-15"). Thereafter this litigation was commenced and the issue was kept before the public by means of numerous media articles, editorial comment, exchanges of letters to the editor, interviews with the authors involved, TV documentary coverage and editorials and the like. The New York Times in its Sunday issue on May 22, 1977 referred in a front page (of the Long Island Section) to the upcoming 1977 board election as a vote upon the book issue (See exhibit "A-16"). Nevertheless (or more probably because of it) Mr. Martin, Vice-President, and I were re-elected (See exhibit "A-17"). I feel that this is complete vindication for and support of our stand concerning these books. We are representing the community which first elected us and re-elected us and our actions have reflected its intrinsic values and desires.

19. Further evidence of the will of the community in this respect is reflected in the results of a questionnaire sent to all 4791

mailing addresses in the district. This was done at our attorney's request due to the alleged class action nature of the suit (See exhibit "A-10"). The results, which had a high percentage of responses based upon past inquiries of similar nature, were wholly supportive of our position. Of those responding (who signed the response) 508 or 59% supported the board while 353 or 41% did not. These parents represented 771 children under 18 or 60.5% in support and 503 children or 39.5% against—a substantial degree of support.

20. At no time has the board or to my knowledge, any member of the administration directed the staff not to discuss the banned volumes or the ideas contained or expressed therein. My objection is to the obscenity and bad taste contained in them as well as their irrelevance, in my opinion, to the basic curriculum of the district and to the values which I, as a board member and president, feel the community wishes inculcated in its youth. The whole thing has been blown out of proportion. The best way to indicate the basic reasons of the board as a whole for the actions taken is to annex various statements made by the board to the public as these events were taking place (See exhibits "A-19", "A-20", "A-21" and "A-22"). A review of these materials (and exhibit "A-1") will indicate that the excerpts about which we were concerned (and later the books themselves) contain every form of obscenity and sexual allusion imagineable. Granted one (Slaughterhouse Five) also makes ridiculous disparaging remarks about Christ and one (The Fixer) about Jews. This does not mean that my objection is based on religious grounds or a desire to favor or exclude one religion over another. I just plain think its in terrible taste and irrelevant to the educational process in my district—not to mention being obscene.

21. The community has seen fit to restore four of the "book burners" to office in the face of public opprobrium and violent

accusations hurled by the media. We must be reflecting their values and wishes. In no way can we be considered to have acted arbitrarily or in bad faith. Recourse should remain at the local level (the polling place) and not be placed on the court's shoulders. We are the elected members of a board charged with the custody of thousands of youngsters during the school day. We stand in the shoes of their parents during that time. These students do not have the same rights to be exposed to obscenities as an adult. I will certainly not be an instrument of it. If they wish to read the "banned" books they are welcome to while not in school as long as their parents do not object. Most of these volumes are in the public library so there are alternative sources. As long as I have the legal right to exercise my discretion in the way I have I shall continue to do so. This is the essence of the concept of community standards and local control of school boards.

22. I have personal knowledge of the matters hereinabove referred to.

RICHARD J. AHRENS

JURAT

EXHIBIT A-1
(EXCERPTS RECEIVED AT CONFERENCE 9/19/75)

RANDOLPH HIGH SCHOOL
Randolph, New York

TITLE: *Soul On Ice* by Eldridge Cleaver
(Leader of Black Panther and not allowed to live in America.)

PAGE: QUOTE

There are white men who will pay you to fuck their wives. He assures you, it's all right, she's my wife. She need black rod is all. There is a certain type who will leave you and his wife alone and tell you to pile her real good. Then there are some who like to peek. There is another type who likes to masturbate while he stands beside the bed. There is the type who likes to eat his woman up after you get through piling her. And there is the type who only wants you to pile her for a little while, just long enough to thaw her out and kick her motor over and arouse her to heat, then he wants you to jump off real quick and he will jump onto her and together they can make it from there by themselves.

NOTE: THIS BOOK WAS RETAINED FOR SENIORS ONLY IN RANDOLPH. THE BOOK IS FULL OF ANTI-AMERICAN MATERIAL AND HATE FOR WHITE WOMEN. WHY WOULD TEACHERS WANT HIGH SCHOOL STUDENTS TO READ THIS???? OUR GROUP IS GOING TO FILE A COMPLAINT AGAINST THIS BOOK ON SEDITIOUS AND DISLOYAL MATTER. PAGE 139-11:8

TITLE: *A Hero Ain't Nothing But a Sandwich* by Alice Childress

Page 10. Hell, no! Fuck the society.

Page 64. The hell with the junkie, the wino, the Capitalist, the welfare checks, the world...yeah, and fuck you too!

Page 75. They can have back the spread and curtains, I'm too old for them fuckin bunnies anyway.

TITLE: *The Fixer* by Bernard Malamud.

Page 52. What do you think goes on in the wagon at night? Are the drivers on their knees fucking their mothers?

Page 90. Fuck yourself, said the blinker, etc.

Page 92. Who else would do anything like that but a mother-fucking zhid?

Page 146. No more noise out of you or I'll shoot Jew cock off. (sic)

Page 189. Also there's a lot of fucking in the Old Testament, so how is that religious?

Page 192. You better go fuck yourself, Bok, said Kogin, I'm onto your Jew tricks.

Page 215. Ding-dong, giddyap. A Jew's cocks in the devil's hock.

Page 216. You cocksucker zhid, I ought to make you lick it up off the floor.

TITLE: *Go Ask Alice* by Anonymous? (suppose to be diary of 15 year old girl)

QUOTES

Page 31. I wonder if sex without acid could be so exciting, so wonderful, so indescribable....that it would be like dogs mating.

Page 47. Chris and I walked into Richie and Ted's apartment to find the bastards stond (sic) and making love to each other...low class queer...

Page 81. ON JUST ONE PAGE: shitty, goddamned, pissing, ass, goddamned bejesus, screwing life's, ass, shit. Doris was ten and had humped with who knows how many men in between...her current stepfather started having sex with her but good...sonofa-bitch balling her.

Page 83. but now when I face a girl its like facing a boy. I get all excited and turned on. I want to screw with the girl....

Page 84. I'd rather screw with a guy...sometimes I want one of the girls to kiss me. I want her to touch me, to have her sleep under me...

Page 84. Another day, another blow job...If I don't give Big Ass a blow he'll cut off my supply...and Little Jacon is yelling, "Mama, Daddy can't come now. He's humping Carla."

Page 85. ON JUST ONE PAGE: Shit, goddamn prick, son-of-a-bitch, ass, pissed, bassard, goddamn, bullshit.

Page 94. I hope you have a nice orgasm with your dog tonight.

Page 110. you fucking Miss polly pure.

Page 117. Then he said that all I needed was a good fuck...

Page 146. It might be great because I'm practically a virgin in the sense that I've never had sex except when I've been stoned...

NOTE: This book, after being reviewed by three teachers was retained. Parents, do not be fooled by the movie version of this book. It reads a lot different. If teachers cannot find a better book than this to illustrate drugs are bad then what are we paying them for. They justify their viewpoint because the girl dies in the end. A lot of teachers think this is a great book????????

TITLE: *Slaughterhouse Five* by Kurt Vonnegut Jr.

QUOTES

Page 34. Get out of the road, you dumb motherfucker...The last word was still a novelty in the speech of white people in 1944. It was fresh and astonishing to Billy, who had never fucked anybody...

Page 37. You stake a guy out on an anthill in the desert—see? He's facing upward, and you put honey all over his balls and pecker, and you cut off his eyelids so he has to stare at the sun till he dies.

Page 40. He had a prophylactic kit containing two tough condoms "For the prevention of Disease only!" He had a dirty picture of a woman attempting sexual intercourse with a shetland pony.

Page 99. They told him that there could be no Earthling babies without male homosexuals. There could be babies without female homosexuals.

Page 120. Why don't you go fuck yourself? Don't think I haven't tried...he was going to get revenge, and that revenge was sweet...It's the sweetest thing there is, said Lazzaro. People fuck with me, he said, and Jesus Christ are they ever fucking sorry. (The rest of this page tells how he fed sharp razor blades to a dog on a piece of steak. It goes on to describe the reaction of the dog.)

Page 122. And he'll pull out a gun and shoot his pecker off. The stranger'll let him think a couple of seconds about who...and what life's gonna be like without a pecker. Then he'll shoot him once in the guts and walk away...He died on account of this silly cocksucker here. So I promised him I'd have this silly cocksucker shot after the war.

Page 134. In my prison cell I sit...with my britches full of shit...And my balls are bouncing gently on the floor. And I see the bloody snag when she bit me in the bag...Oh, I'll never fuck a Polack any more (THIS IS A POEM????)

Page 173. And the peckers of the young men would still be semi-erect, and their muscles would be bulging like cannonballs.

Page 175. They didn't have hard-ons....Everybody else did.

Page 177. The magazine, which was published for lonesome men to jerk off to.

Page 178. and one critic said..."To describe blow-jobs artistically.

NOTE: PLEASE READ EVERY WORD OF THIS SECTION pages 94 & 95: But the Gospels actually taught this: Before you kill somebody, make absolutely sure he isn't well connected...

The flaw in the Christ stories...was that Christ...didn't look like much, was actually the son of the most powerful Being in universe. Readers understood that, so, when they came to the crucifixion, they naturally thought...Oh boy—they sure picked the wrong guy to lynch this time! And that thought had a brother: There are right people to lynch...people not well connected...The visitor from outer space made a gift to Earn of a new Gospel. In it, Jesus really WAS a nobody, and a pain in the neck to a lot of people with better connections than he had...So the people amused themselves one day by nailing him to a cross and planting the cross in the ground. There couldn't possibly be any repercussions, the lynchers thought...since the new Gospel hammered home again and again what a nobody Jesus. And then just before the nobody died...The voice of God came crashing down. He told the people that he was adopting the bum as his son...God said this FROM THIS MOMENT ON, HE WILL PUNISH HORRIBLY ANYBODY WHO TORMENTS A BUM WHO HAS NO CONNECTIONS.

MORE R-RATED BOOKS

(THE FOLLOWING WERE FOUND IN THE CARD CATALOG OR ON SHELVES OF TARA H.S. LIBRARY MARCH 23, 1975, BY AN INSPECTION TEAM OF CONCERNED CITIZENS AND TAXPAYERS FOR DECENT SCHOOL BOOKS):

The Best Short Stories by Negro Writers. Ed. by Langston Hughes

Page 176. "like bat's shit and camel piss."

Page 288. "that no-count bitch of a daughter of yours is up there up North making a whore of herself."

Page 237. "They made her get out of the car and stand in front of the headlights and pull her pants and raise her dress—they said that that was the only way they could be sure. And you can imagine what they said and what they did."

Page 301. "You need some pussy. Come on, let's go up to the whore house on the hill."

"Oh, those bastards, this God damned Army and the bastards in it. The sons of bitches."

Page 436. "he produced a broom rag doll, looked at her again, then grabbed the doll by its legs, and tore it part way up the middle. Then he jammed his finger into the rip between the doll's legs. The other men laughed..."

Page 444. "The pimps, hustlers, lesbians, and others trying to misuse me."

Page 462. "But she had straight firm legs and her breasts were small and upright. No doubt if she'd had children her breasts would be hanging like little empty purses."

Page 464. "She first became aware of the warm tense nipples on her breasts. Her hands went up gently to calm them." "In profile, his penis hung like a stout tassle. She could even tell that he was circumcised."

Page 406. "Cadillac Bill was busy following Luheaster around, rubbing her stomach and saying, 'Magic Stomach, Magic Stomach, bring me a little baby cadillac.' " "One of the girls went upstairs with Red Top and stayed for about forty five minutes."

Real Magic by P.E.I. Bonewits

Pages 172-3. "There is a particular person you really want to go to bed with but he or she isn't interested...Again you use the multi-media approach; you surround yourself with the sounds, smells, lights, textures, and colors that remind you of pure, adulterated lust!...You imagine the target as passionately assuming a sexual position, ready and willing...Wait as long as you can to build up your lust to its peak, and then fire. A physical orgasm at the time of firing will actually help, (but not before.) Some readers might think that this is merely a description of sexual fantasy. It's more. In a sexual fantasy the goal is an orgasm and nothing more. In a lust spell any orgasm is a mere side effect to the real goal, which is the discharge of psychic energy to affect someone else's mind."

Black Boy by Richard Wright

Pages 70-1. "We black children used to run to the Jew's store and shout: 'Bloody Christ killers—Never trust a Jew—Bloody Christ killers—What don't a Jew do?' or 'Red, white and blue—Your pa was Jew—Your ma a dirty Dago—What the hell is you?"

Page 265. "Crush that nigger's nuts, nigger!" "Hit that nigger!" "Aw, fight, you goddam niggers!" "Sock 'im, in his f–k–g piece!" "Make 'im bleed!"

Laughing Boy by Oliver LaFarge

Page 38. "I tell you . she is all bad; for two bits she will do the worst thing."

Pages 258-9. "I was frightened when he wanted me to lie with him, but he made me feel all right. He knew all about how to make women forget themselves, that man."

Black Rage by William H. Grier and Price M. Cobbs

Pages 76-7. "The fascination black people have for white people in the sexual area can hardly be exaggerated...In possessing the right woman he sees himself as degrading her, in this instance sharing the community's feelings that a white woman who submits to a black lover becomes as debased as he. In this way he may feel the gratification of turning the tables on his white oppressor and thus becoming the instrument through which a white person is degraded."

The Naked Ape by Desmond Morris.

Pages 73-4. Also, the frontal approach provides the maximum possibility for the pulling effect of the male's thrusts, regardless of his body position in relation to the female, but in a face-to-face mating there will in addition to the direct rhythmic pressure of the male's pubic region on to the clitoral area, and this will considerably heighten the stimulation." "So it seems plausible to consider that face-to-face copulation is basic to our species. There are, of course, a number of variations that do not eliminate the frontal element: Male above, female above, side by side, squatting, standing, and so on, but the most efficient and commonly used one is with both partners horizontal, the male above the female..."

Page 80. "...This broadening of the penis results in the female's external genitals being subjected to much more pulling and pushing during the performance of pelvic thrusts. With each

inward thrust of the penis, the clitoral region is pulled downwards and then, with each withdrawal, it moves up again. Add to this the rhythmic pressure being exerted on to the clitoral region by the pubic region of the frontally copulating male, and you have a reapeated massaging of the clitoris that—were she a male—would virtually be masturbatory."

Pages 94-5. "...If either males or females cannot for some reason obtain sexual access to their opposite numbers, they will find sexual outlets in other ways. They may use other members of their own sex, or they may even use members of other species, or they may masturbate..."

LEGISLATORS: KEEP MORATORIUM ON SEX ED! PROVIDE CRIMINAL PENALTY SO D.A.'S CAN PROSECUTE VIOLATORS! PROTECT THE CHILDREN.

Our Sexual Evolution by Helen Colton—This library book displayed in the Tara High School Library appears to be in violation of Act 500 of the Louisiana Legislature. It belittles parents, presents no moral judgments, is anti-Christian and contrary to laws of God. It has chapters on Group Marriage, Abortion, Contraceptives, etc. It also promotes women's lib. It cost $5.95 of our tax dollars.

A Reader for Writers—A Critical Analogy of Prose Readings by Jerome W. Archer—This book was used in an advanced composition class at Tara High School. It equates Malcolm X, considered by many to be a traitor to this country, with the founding fathers of our country.

Mass Media and the Popular Arts by Rissover/ Birch (McGraw-Hill Book Co.)—This was used as a textbook in a high school English class in several high schools until its withdrawl when the District Attorney threatened legal action if the book was continued to be used.

Excerpts follow:

Page 85. "Viewers saw only the nightsticks rising and falling; they never heard the unison chants of 'F--k the cops' or saw the bags of human excrement thrown by the Yippies. And after the convention, when it was time to sum up, all the Respected Commentators could do was gangbang the cops."

Page 95. "I Turned the School Dance Into a Drug-filled Sex Orgy"—"Wedding Night bot, I'll Have Her Begging for More"—"Fourteen and My Stepfather Said 'Now You're Ripe for Me to Love"—"My Husband Thinks I'm FRIGID, but His Brother Knows I'm Not"—"Virgin Nurse In a Sex-crazed Madman's Ward."

Page 195. "Poor Tom has just learned that the male offspring of his second wife is the product of his grown son by his first wife."

Page 231. "...Italian homosexual who had been the last companion of his mother (or at least the woman he thought was his mother) and in her rage took the gold bracelet that the Italian homosexual had had Robin's name engraved on, a bracelet that could have been embarrassing..."

Page 234. "I could see the womanly rippling muscles underneath and the fine wide breasts that fought the negligee to be free. She sat down on the couch and cut off the buttons. The negligee fell open. She didn't bother to close it."

Page 235. "She had fine wide shoulders and handsome breasts that struck out against the jacket of her smart suit...When she returned she was dressed only in a pair of peach-fuzz panties. She lay down on the couch and beckoned. I went over, my blood on fire. In a moment I felt her lips against mine, her body pressing hard. I could hardly breathe. The blood was hammering in my head. 'Take me now,' she gasped."

Page 236. "Her breasts, free and unsupported, fought against her lingerie and against her blouse...The next thing I know I was in paradise..."

Page 237. "She was coming toward me now, her nostrils flaring, her beautiful breasts scrimmaging with a nylon blouse."

Page 287. "While the White Panthers talk of 'total assault upon the culture by any means necessary, including rock and roll, dope and f--king in the streets..."

Page 289. "...motherf--ker..."

Page 290. "...he had to display his penis to make his point."

Page 310. "In school we learn to be good little Americans—or Frenchmen—or Russians. We learn how to take the crap that's going to be shoveled on us all our lives...Schools exploit you because they tap your power and use it to perpetuate society's trip, while they teach you not to respect your own. Schools petrify society because their method, characterized by coercion from the top down, works against any substantial social change. Students are coerced by teachers, who take orders from administrators, who do the bidding of those stalwarts of the status quo on the board of education or the board of trustees."

Page 311. "As the tensions in our society work their way up to the surface, some overt rebellion appears in many settings; certainly it appears in schools, which offer at least a meeting place and staging ground for young middle-class rebels. May it grow in good health."

Page 312. "...There is very little shit we will not eat if there is something to be gained by it."

Page 244. "...G--damn..."

NOTE: CONCERNED CITIZENS AND TAXPAYERS FOR DECENT SCHOOL BOOKS (BOX 1984, BATON ROUGE, LA.) HAVE BEEN DENIED PERMISSION BY THE E.B.R. SCHOOL BOARD TO EXAMINE SCHOOL BOOKS. HOW MANY MORE BOOKS SUCH AS THE ABOVE ARE IN THE SCHOOLS???

EXHIBIT A-2

OFFICE OF THE SUPERINTENDENT OF SCHOOLS

February 27, 1976

CONFIDENTIAL MEMO

TO: Board of Education

FROM: Richard Morrow, Superintendent

SUBJECT: *List of Books to be Banned*

This will be a somewhat lengthy memo in which I'll try to do several things: 1) make clear what I was trying to say at the February 24th private session (just prior to the public meetings); 2) tell you what is already starting to happen as a result of our pulling from the shelves the books on that list; and 3) propose a way the whole issue can be handled quickly and, above all, as quietly as possible.

Since several weeks will go by before we meet again and since the whole issue could get way out of hand before we do, I'd appreciate it if once you've all read this that you contact Mr. Ahrens about it. I'll plan to call him next Wednesday to see what your reactions are.

I. *My Point of View*

I tried to make myself as clear as possible on the 24th, but we were all pressed for time and there was considerable heat surrounding the issue. Let me try to explain how I view the issue.

First, I do not defend literature which contains "rot" of the kind that many books do. I would not defend any of the books on the list without knowing a great deal more about them. It happens that I have read only one book on the list—incidentally, I saw the list for the first time that night. The others are unknown to me.

It is no doubt true that some books in print are unsuitable for school age children, and they should not be used in schools. However, the judgment of their suitability or unsuitability should be made by people in each school district (because districts do differ in their tastes) and only after reading and evaluating the books called into question.

Second, as just mentioned, I feel that the judgment to remove a book should be made *in each district* and by parents and staff together. A committee including both should examine the challenged books, and recommend action to the administration and the Board. The final decision, of course, is the Board's. My objection to direct action banning all the books on the list purchased at Watkins Glen is that we don't know who developed the list, nor the criteria they used. I don't believe we should accept and act on someone else's list, unless we first study the books ourselves.

Third, we already have a policy—Croft number 6163.1—designed expressly to handle such problems. It calls for the Superintendent, upon receiving an objection to a book or books, to appoint a committee to study them and make recommendations. I feel it is a good policy—and it is Board policy—and that it should be followed in this instance. Furthermore, I think it can be followed quietly and in such a way as to reduce, perhaps avoid, the public furor which has always attended such issues in the past.

Fourth, I have no doubt (but of course no proof) that such a local committee would end up agreeing about most of the books

on the list. The Board's feelings on them are not so different from the staff's and parents'—after all, that is shown by the fact that the large majority of books listed are not and apparently never have been recommended and used by the staff.

Fifth, unilateral banning by the Board, without inputs from the staff, would surely create a furious uproar—not only in the staff, but across the community, Long Island and the state. I don't believe you want such an uproar, and I certainly don't.

II. *What's Starting to Happen About the Issue*

After the February 24th meeting when the Board directed the principals that those books be withdrawn from the libraries, several things have happened, all of which are tending to blow the issue into a major dispute. Both principals, of course, had to direct the librarians to remove the books; and inevitably the word began to get around. On Thursday, Mrs. Turin came to me to question what had happened, for example.

Mr. Carroll discovered, on the 25th, that one book on the list but not in the library, is being used as part of a senior course in Literature—Malamud's *The Fixer*. It had been approved as part of that course in January 1972, by the Board of Education. As quietly as possible and without comment, he called in all copies of that book. Inevitably and despite his best efforts to keep things quiet, rumors have already circulated in the High School and even now in some of the elementary schools.

The issue is heating up, and copies of the list are starting to circulate. It will almost certainly become a major controversy in short order. Let me underline one thing here: everyone involved has been close-mouthed and as low-key as possible. Inevitably, though, the rumors are beginning to develop.

III. *What I Propose*

I propose that, beginning as soon as you give me the O.K. (hopefully next Wednesday through Mr. Ahrens), we appoint a staff-parent committee to take under study the books on the list. There are nine in the High School Library, one ("A Reader for Writers") in the Junior High Library, and one ("The Fixer") being used in a 12th grade Literature Course—a total of 11.

Although the policy calls for the Superintendent to appoint the whole committee, I'd suggest that the Board name two or three parents. I would name: Mrs. Turin, the District Chairman of Libraries; Mr. Brunnemer, High School Librarian; an English Department Head; and either Mr. Valenze or Mr. Carroll.

Once the Committee is established, we can withdraw the challenged books to the Library storage shelves, pending study and recommendation by the Committee and final decision by the Board.

I really think this is the best solution, and I'm asking your support.

Richard G. Morrow
Superintendent

RGM: ms

EXHIBIT A-3

OFFICE OF THE DISTRICT CLERK

March 3, 1976

MEMORANDUM

TO: Dr. Richard Morrow

FROM: Richard Ahrens

RE: LIBRARY BOOKS

It is the Board's desire that *all copies* of the library books in question be removed from the libraries to the Board's office at the rear of the Residents' Reference Room in Stokes for a review by the Board, after which we will decide whether or not a committee is necessary in this matter.

Thank you.

R.A.

—iw
cc: Board members

I certify this to be a true copy of a memorandum typed by me on March 3, 1976.

Isabelle Wirkula
District Clerk
March 26, 1976

EXHIBIT A-4

OFFICE OF THE SUPERINTENDENT OF SCHOOLS

Confidential (for Committee, Bd Ed only)

Book Review Committee Members

Mr. Robert Amato
21 Amherst Lane
Hicksville, N.Y. 11801
Tel: 822-7457

Mr. Irving Carroll
1070 Barbara Court
North Bellmore, N.Y. 11710
Tel: 781-3035

Mr. Donald Ferris
7 Lowland Road
Levittown, N.Y. 11756
Tel: 731-5490

Mr. Thomas Lane
237 Crane Place
Levittown, N.Y. 11756
Tel: 731-2268

Mr. Charles Lipp
5 Everett Place
Halesite, N.Y. 11743
Tel: 271-7166

Mr. George O'Donnell
2 Polaris Drive
Levittown, N.Y. 11756
Tel: 731-6802

Mrs. Carol Sachs
80 Bloomingdale Road
Levittown, N.Y. 11756
Tel: 731-5532

Mr. Richard Segerdahl
157 Margaret Boulevard
Merrick, N.Y. 11566
Tel: 546-9012

RGM:kr
4/7/76

EXHIBIT A-4

OFFICE OF THE SUPERINTENDENT OF SCHOOLS

April 7, 1976

Instructions to the Book Review Committee

The Board of Education has asked you to serve as members of a Committee to review several books which have been challenged.

The Board seeks the collective judgment of the Committee about these books, on the basis of these criteria:

1) Their educational suitability
2) Good taste
3) Relevance
4) Appropriateness to age and grade level

We ask that you judge these books in terms of the above, and make recommendations to the Board and the Superintendent concerning their disposition.

We further ask that you withhold any public statements about these books until after you have made your recommendations to the Board and Superintendent.

RGM:kr

EXHIBIT A-5

AGREEMENT

between the

Island Trees Union Free School District #26 Board of Education
County of Nassau, Levittown, N.Y.

and the

United Teachers of Island Trees

July 1, 1975-June 30, 1978

It is agreed by and between the parties that any provision of this agreement requiring legislative action to permit its implementation by amendment of law or by providing the additional funds therefor, shall not become effective until the appropriate legislative body has given approval.

WALF H. OGLESBY
Island Trees Union Free School District
Town of Hempstead
Island Trees 3, Levittown, N.Y. 11756

3. Any teacher may request a followup evaluation in the event that a point of methodology or content is questioned on initial evaluation. The principal and the teacher should discuss this matter and reach a mutual understanding with the person or persons who make the second evaluation. This person or persons shall be selected from the group described in Section C-1.

4. All evaluation forms will be retained at the building level, district office, and a duplicate copy must be given to the teacher. Each teacher shall sign the original. Said signature confirms that the teacher has seen the form, but does not necessarily indicate his/her agreement with the contents.

5. All evaluative material placed in a teacher's personnel file after employment will be available to the teacher for reading. The teacher will also have the right to submit a written answer to any such material and his answer shall be attached to the file copy.

D. *Report of Special Achievement*

Administrators are hereby encouraged to place in the teachers' files information of a positive nature indicating special competencies, achievements, performances or contributions of an academic or professional nature. The teacher will acknowledge that he has had the opportunity to review such material by affixing his signature to the copy to be filed.

E. *Revision of Evaluation Procedure*

The Board and the U.T.I.T. agree to continue a committee to study teacher evaluation and to prepare and submit to the Board and to the U.T.I.T. for their mutual consideration a revised evaluation procedure. It is hereby agreed that the purpose of an evaluation procedure is continually to strengthen and improve the quality of education in the Island Trees School District.

ARTICLE XIX
ACADEMIC FREEDOM

The District's educational program is keyed to the preparation of students for intelligent and meaningful participation in a

democratic society. The Board and the U.T.I.T. agree that academic freedom is essential to the fulfillment of this purpose.

Accordingly, it is agreed that teachers shall have the right to introduce and explore controversial material, provided only that the material and the manner in which it is presented are in good taste, appropriate to the grade level, and relevant to course content. Every effort will be made to present all sides of controversial issues.

It is understood that any topic not included in the curriculum approved by the Board of Education will not be taught. Knowledge of Board approved course content is the responsibility of each staff member.

EXHIBIT A-6

OFFICE OF THE SUPERINTENDENT OF SCHOOLS

3/30/76

Statement Concerning the Book Issue
by
Richard Morrow, Superintendent

I wish to speak tonight to the Board and the Island Trees community concerning the issue of the books recently challenged as objectionable in their content.

All of you are aware that I have not made detailed statements to the press. I want you to know why. I have definite views on the issue, and have had since this whole thing began. My proper public forum as the Superintendent of Island Trees Schools, however, is before the community in public meeting.

The Facts

The heat generated by the book issue has resulted in serious distortions of the truth, and these must be corrected. I will briefly recount what happened.

On February 24th of this year, in a session prior to its regular public meeting, the Board of Education indicated to me, the two Assistant Superintendents and the two Secondary Principals the following: at a conference held last fall in Watkins Glen, board members had obtained a list of 32 books, with attached excerpts from each, which some person or organization distributed as a list of "objectionable" books. As I was told by the Board, two Board members visited the high school library sometime in November

1975, to examine its card catalog. They found nine of the 32 books indexed. However—and this is important—they did not remove the books nor the cards; that was done in February by administrators carrying out a Board directive, as I will shortly explain.

At that February 24th session, the list of 32 books was distributed to the administrators and the principals were directed by the Board to remove the books on the list for review by the Board. At that time, I urged the Board not to take that step, but to follow existing Board policy and establish a Review Committee composed of parents and staff members. The books would then be referred to the Committee, and its deliberations would result in recommendations to be considered by the Board. Incidentally, it has been reported that administration advised the Board to remove the books quietly. What I recommended was that the books be referred to a Committee, pursuant to existing Board policy—obviously this would not keep things quiet. However, as I believed then and still believe, the proper use of established procedure would have avoided the kind of hysterical emotionalism we now have. It would instead have maintained, as much as it is possible in such issues, a reasonably calm and objective atmosphere.

On the day after the Board directed him to do so—on February 25th—the High School Principal directed his librarians to hand in the nine books on the list. The Junior High Principal found that one other book on the list of 32—a book entitled *A Reader for Writers*—was in his library, and he removed it because it was on the list. The Senior High School Principal found that another book—Malamud's *The Fixer*—had been approved by the Island Trees School Board in 1972, and was in use in a Senior Literature Course. Nevertheless, since it was on the list, he had it removed.

These facts just described are important. There have been

claims that no one knew of the books' removal until sometime early in March. The books were removed from the shelves on February 25th. I know that a number of librarians and teachers knew of the removal then, and I know that rumors about their removal were already circulating by the end of February.

It was also reported that administrators suggested additional books for removal, and that has been interpreted to mean books in addition to those on the list. This is not so. The two additional books—*The Fixer* and *A Reader for Writers*—were on the list, and were removed only because they were on the list.

The books were removed on February 25th. Very soon after that, I made another appeal to the Board to follow established policy and create a Review Committee. The Board chose not to, and directed me to have the books moved to the District Residents' Reference Room in Stokes. I did so.

My Views in the Issue

I wish to state for the record where I stand in this matter.

First, there is no question that under New York State Education Law, a local Board of Education has the ultimate responsibility to approve or disapprove reading materials which will be used in the schools. This responsibility extends both to textbooks and to library books. However, I feel it is wrong for a Board—or any other single group—to act to remove books without prolonged prior consideration of the views of both the parents whose children read these books, and the teachers who use these books to instruct.

Second, it is wrong to judge any book on the basis of brief excerpts from it. Many books—among them widely acclaimed

classics—contain brief passages which, if taken out of context, would seem to condemn them.

Third, I believe it is wrong to take action based on a list prepared by someone outside the Island Trees community. The list of 32 books was obtained in Watkins Glen from a source previously unknown to me. The reputed author of the list is an organization called Parents of New York—United. The standards upon which the list was prepared are claimed to be objection to obscenity and degrading language, and to statements of ethnic or racial bias. However, the organization which prepared the list did not spell out their criteria for determining which books should be on it. In fact, it did not even sign the list or identify its source. Without a statement of these criteria, how can Island Trees decide whether it shares the same views?

Fourth, I believe it was wrong to by-pass the established procedure for reviewing the challenged books. The policy—Board Policy 6163.1—was adopted for good reasons. The wisdom of that policy, calling for an orderly review by a Committee, is shown, I think, by what has happened because we didn't follow it.

My Recommendations

I will now repeat my recommendation that a Book Review Committee be appointed immediately, and that it include parents, teachers, librarians and administrators.

Second, I recommend that the Committee be instructed to review all 11 challenged books, and to make recommendations about them to the Superintendent and Board as soon as possible—but no later than May 7th, so that decisions on the books can be made in May.

Third, I recommend that in the interim the challenged books be returned to the shelves, with the understanding that every parent has the right and the responsibility to supervise the materials his child reads.

Finally, I urge everyone—the press as well as all the parties to this controversy—to refrain from further charges and recriminations, and to give this procedure time to function as it was intended.

Richard G. Morrow
Superintendent

RGM:ms
3/30/76

EXHIBIT A-7

OFFICE OF THE SUPERINTENDENT OF SCHOOLS

April 2, 1976

MEMO

TO: Board of Education

FROM: Richard Morrow, Superintendent

SUBJECT: *Book Review Committee; Mrs. Stein's Audience; Budget Review*

I. *Book Review Committee*

I am in hopes that on Monday night, in a Special Meeting just before our Budget Work Session, we can appoint the Book Review Committee.

Actually, two decisions are needed.

First, we should decide whether to return the books pending review by the Committee. I think we should.

Second, we need to appoint the Committee itself. I have been receiving volunteers from the community, and as of this writing they are the following:

Mrs. Barbara Benigno
Mrs. Margaret Bonczyk
Mrs. Helene Burd
Marie Connolly
William Connolly
Mrs. Cusker

Robert Dering
Miss Jodi Doff
Joanne Fanelli
Mrs. Grenier
Mrs. Roslyn Haber
Michael Kmetz
Mrs. Carol Rogoff
Joellen Wachter
Mrs. Edna Yarris
Mr. Donald Ferris

Any others who volunteer on Monday will be reported to you on Monday night.

In addition, I have tentatively contacted staff members to serve, and two have been identified: Irv Carroll, and Mr. Fred Young, a Junior High English teacher. I am still trying to identify a Senior High teacher and a librarian, and will hopefully have their names on Monday.

II. *Mrs. Stein's Audience*

Mrs. Stein is scheduled for an audience before the Board at 8:30 p.m. on Monday night. I am not the best person to advise you how to handle that; I'd suggest you talk to George Lipp about it.

III. *Budget Review*

As I understand it, the major part of the meeting Monday night will be devoted to Budget review. You already have the necessary materials. One added note: the State Aid picture, which we once thought to be settled and clear, has been muddied by Carey's recent veto of the state aid formula.

I'll update all of us as much as I can on Monday night.

Richard G. Morrow
Superintendent

RGM:kr

(EXCERPTS OF BOARD MEETING MINUTES 3/30/76)

LIBRARY BOOKS

Old Business

On motion of Mr. Martin, and seconded by Mr. Melchers,

RESOLVED, to ratify the action of the Board of Education regarding the library books, as stated in the March 3, 1976 memo.

Unanimously carried Ayes 7 Nays 0

BOOK COMMITTEE TO BE APPTD.

On motion of Mr. Melchers, and seconded by Mr. Nessim,

RESOLVED, that a committee, comprised of four members of the staff and four parents, be appointed by the board to read, review and make recommendations regarding the books listed in the March 3rd memo. The recommendations are to be with regard to the educational suitability of these books and whether they are in good taste, appropriate and relevant.

Unanimously carried Ayes 7 Nays 0

MEETING ADJOURNED

On Motion of Mr. Melchers, and seconded by Mr. Hughes,

RESOLVED, to adjourn the meeting at 10:00 P.M.

Unanimously carried Ayes 7 Nays 0

Respectfully submitted

Isabelle Wirkula
District Clerk

Minutes approve: 4/27/76

EXHIBIT A-9

ISLAND TREES UNION FREE SCHOOL DISTRICT
Town of Hempstead
Owl Place and Condor Road
ISLAND TREES 3, LEVITTOWN, N.Y. 11756
Area Code 516 — 731-4020

RICHARD G. MORROW
Superintendent of Schools

April 8, 1976

Dear

The Board of Education and I both thank you for volunteering to serve as a member of the Committee to review and make recommendations concerning the books which have been challenged.

Of course, the decision as to whom to appoint was an extraordinarily difficult one. It was necessary to limit the committee's size, and only four community members could be appointed. You were not one of those chosen.

We want you to know, however, that we appreciate your concern and your offer of assistance.

Sincerely,
Richard G. Morrow
Superintendent

RGM:kr
Letter sent to:

Mr. Michael Kmetz
Mr. William Connolly
Mrs. Helene Burd
Miss Jodi Doff
Mrs. Roslyn Haber
Mrs. Joellen Wachter
Mrs. Edna Yarris
Mrs. Margaret Bonczyk
Mr. Robert Dering
Mrs. Grenier
Mrs. B. Benigno
Mrs. M. Connolly
Mrs. J. Cannella
Mrs. C. Rogoff
Mrs. Cusker

OFFICE OF THE SUPERINTENDENT OF SCHOOLS

April 8, 1976

A Book Review Committee was established jointly by the Island Trees Board of Education and the Superintendent at the April 6 work session.

The four community members are: 1) Mr. Donald Ferris, former Board of Education member; 2) Mr. Thomas Lane, a 1972 Island Trees High School graduate, and a student at Farmingdale Community College; 3) Mr. George O'Donnell, a U.S. Post Office letter carrier and a district resident for two years and 4) Mrs. Carol Sachs, parent and President of the Island Trees PTA Council.

The four staff members are: 1) Mr. Robert Amato, High School Social Studies teacher; 2) Mr. Irving Carroll, High School Principal; 3) Mr. Charles Lipp, High School English teacher; and 4) Mr. Richard Segerdahl, Stokes School Principal and a former Junior High guidance counselor and assistant principal.

The Committee will begin review of the books after its initial meeting on April 7. The books will remain off the shelves during the review, until the Board acts on the Committee's recommendations.

RGM:kr

EXHIBIT A-11

ISLAND TREES HIGH SCHOOL
OFFICE OF THE PRINCIPAL

TO: Dr. Morrow and Board of Education

FROM: Irving Carroll, Chairman - Book Review Committee

DATE: April 30, 1976

The Book Review Committee met on Thursday, April 29, at 7:30 P.M. Seven members were in attendance. Mr. Thomas Lane could not attend but sent in his review and vote.

After a very comprehensive discussion regarding the book *The Fixer* by Bernard Malamud, the vote to return the book to our Modern Literature curriculum was: 6 YES and 2 NO. It was further amended that the book would be returned subject to parental approval. In other words, if a parent disapproves of this book, his or her child will not be required to read it.

Our next meeting is scheduled in your office for Wednesday, May 12, at 7:30 P.M.

Respectfully submitted,
Irving Carroll, Chairman

IC:el

EXHIBIT A-12

ISLAND TREES HIGH SCHOOL
OFFICE OF THE PRINCIPAL

MEMO TO: Mr. R. Ahrens and Board of Education

FROM: Mr. I. Carroll, Chairman

DATE: May 13, 1976

In the review of the books a question has arisen and I have been directed by the Committee to ascertain the answer from you.

Two of the books are a collection of short stories; namely, *Best Short Stories By Negro Writers* - Langston Hughes, and *A Reader For Writers* - Jerome Archer.

The Committee would like to know whether you object to specific stories or the entire book. The Committee would appreciate having this information for our next meeting on Wednesday, May 26.

IC:el

EXHIBIT A-13

TO: Members of the Board of Education

REPORT OF THE BOOK REVIEW COMMITTEE

The Board of Education has asked us to serve as members of a Committee to review several books which have been challenged. The Board seeks the collective judgement of the Committee about these books, on the basis of these criteria:

1) Their educational suitability
2) Good taste
3) Relevance
4) Appropriateness to age and grade level

It was agreed that each member of the Committee would read every book and that the voting would be by closed ballot. A comprehensive discussion of each book was held before voting on the recommendation to the Board of Education.

NOTE: A "YES" vote indicates recommendation that the book be retained. A "NO" vote indicates recommendation that the book be removed from the library.

MEETING DATE	TITLE	AUTHOR
May 12	Laughing Boy YES 8 NO 0	Oliver LaFarge
May 12	Slaughter House Five YES 4 NO 4 (a 2nd vote was taken to put this on a restricted shelf) YES 5 NO 3	Kurt Vonnegut. Jr.

May 26	Black Boy YES 8 NO 0	Richard Wright
May 26	Go Ask Alice YES 7 NO 1	Anonymous
May 26	A Hero Ain't Nothing But A Sandwich YES 4 NO 4	Alice Childress
June 16	The Naked Ape YES 2 NO 6	Desmond Morris
	Down These Mean Streets YES 3 NO 5	Thomas Piri
	Soul On Ice YES 4 NO 4	Eldridge Cleaver
June 30	The Best Short Stories by by Negro Writers YES 5 NO 2 1 ABSENT	Langston Hughes
	A Reader for Writers	Jerome W. Archer

(This book seems to be unavailable in this area. For this reason, most of the members would not have been able to read the book within a reasonable length of time. Therefore, we are unable to make a recommendation).

As Chairman of the Committee, I wish to state that I am extremely proud of each member for undertaking a very difficult, responsible, and arduous task. It was a pleasure to work with them and, even though differences of opinion were expressed,

mutual respect was maintained.

Respectfully submitted,
Irving Carroll, Chairman

Committee Members:
Mr. Robert Amato
Mr. Donald Ferris
Mr. Thomas Lane
Mr. Charles Lipp
Mr. George O'Donnell
Mrs. Carol Sachs
Mr. Richard Segerdahl

Date: July 1, 1976

EXHIBIT A-14

Minutes of the Regular Meeting of the Board of Education, Island Trees Union Free School District, Town of Hempstead, County of Nassau, Levittown, New York. The meeting was held at the Michael F. Stokes School, Owl Place and Condor Road, Levittown, New York, on Wednesday, July 28, 1976.

The meeting was called to order by the president, Mr. Ahrens, at 9:30 P.M.

PRESENT: Mr. Richard Ahrens, President
Mr. Frank Martin, Vice President
Mrs. Christina Fasulo
Mr. Patrick Hughes
Mr. Richard Melchers
Mr. Richard Michaels
Mr. Louis Nessim

Also present: Mr. Walf H. Oglesby, Acting Superintendent of Schools, Mr. George W. Lipp, Jr., Chief Legal Officer, and Mrs. Isabelle Wirkula, District Clerk.

PLEDGE

Mr. Ahrens led the pledge of allegiance to the flag.

MINUTES APPROVED

On motion of Mr. Hughes, and seconded by Mr. Nessim,

RESOLVED, to approve the minutes of the Regular Meeting of June 29, 1976, and the Reorganizational Meeting of July 1, 1976, as presented.

Unanimously carried Ayes 7 Nays 0

CROFT - SUPT. OF SCHOOLS APPROVED

On motion of Mr. Hughes, and seconded by Mr. Martin,

RESOLVED, to approve Croft - Policies, Regulations #2111.1 Qualifications and Appointment Superintendent of Schools

Unanimously carried Ayes 7 Nays 0

W.H. OGLESBY APPOINTED SUPT. OF SCHOOLS

On motion of Mr. Ahrens, and seconded by Mrs. Fasulo,

RESOLVED, that Walf H. Oglesby be given a four year contract commencing July 1, 1976, ending June 30, 1980, as Superintendent of the Island Trees Union Free School District, effective July 1, 1976.

Unanimously carried Ayes 7 Nays 0

R.N. SEGERDAHL APPOINTED ASST. SUPT. & PRINCIPAL

On motion of Mr. Hughes, and seconded by Mr. Michaels,

RESOLVED, that Richard N. Segerdahl be appointed Assistant Superintendent of Curriculum and Principal of the M.F. Stokes School for the school year 1976-77, effective July 1, 1976.

Unanimously carried Ayes 7 Nays 0

POSITIONS ABOLISHED NURSE-TCHRS. GUIDANCE ELEMENTARY

On motion of Mr. Martin, and seconded by Mr. Nessim,

RESOLVED, that the Island Trees Union Free School District

abolish the seven nurse-teacher positions, one guidance position, and five elementary teaching positions, effective June 30, 1976.

Unanimously carried Ayes 7 Nays 0

Superintendent's Report

HANDICAPPED COMMITTEE

On motion of Mr. Hughes, and seconded by Mr. Martin,

RESOLVED, that a Committee for the Handicapped be designated as consisting of an Assistant Superintendent of Schools, as Chairman, a school medical doctor, two school psychologists, a teacher of the handicapped, a district certified social worker, and two parents of handicapped children.

Unanimously carried Ayes 7 Nays 0

BUILDING RENTAL FEES APPROVED

On motion of Mr. Nessim, and seconded by Mrs. Fasulo,

RESOLVED, that the schedule of building rental fees attached and the application form for use of school district buildings and grounds be approved.

Unanimously carried Ayes 7 Nays 0

APPROVAL FOR BOCES ATTENDANCE

On motion of Mr. Martin, and seconded by Mr. Nessim,

RESOLVED, that BOCES programs by a post graduate student in dental assisting (student's expense); auto mechanics by a Coast Guard veteran (district expense); and a 3rd year program by a student for marine engines, be approved.

Unanimously carried Ayes 7 Nays 0

FIRE PREVENTION PROGRAMS

On motion of Mr. Martin, and seconded by Mr. Nessim,

RESOLVED, that the district cooperate with the Levittown Fire Department in presenting fire prevention programs in the schools of the district.

Unanimously carried Ayes 7 Nays 0

RECREATION PROJECT W/ TOWN OF HEMP.

On motion of Mr. Hughes, and seconded by Mr. Nessim,

RESOLVED, that the district apply for funds for a recreation project in the amount of $3,200. in conjunction with the Town of Hempstead

Unanimously carried Ayes 7 Nays 0

CROFT-1st Reading JOB DESCRIPTIONS

CROFT - Policies, Regulations

First Reading — #2111 (a) & (b) Superintendent of Schools
#2112 Assistant Superintendent: Business
#2113 (a) & (b) Assistant Superintendent: Curriculum & Instruction

PERSONNEL REPORTS APPROVED

On motion of Mrs. Fasulo, and seconded by Mr. Nessim,

RESOLVED, to approve the following personnel reports, as presented:

#401.177.001 Items 1 through 15
#401.177.002 Items 16 through 30
#401.177.003 Items 31 through 45
#401.177.004 Items 46 through 61
#401.177.005 Items 62 through 67, and Items 1 and 2
#401.177.006 Items 1 through 10
#401.177.007 Items 11 and 12, and Item 1
#401.177.008 Items 1 through 5
#401.177.009 Item 1

Unanimously carried Ayes 7 Nays 0

Business Administrator's Report

BIDS APPROVED

On motion of Mr. Martin, and seconded by Mrs. Fasulo,

RESOLVED, that bids #673.077.002 — Milk and Chocolate Milk, and #673.077.003 - Ice Cream, be approved.

Unanimously carried Ayes 7 Nays 0

MAG. BID TABLED

Bid #673.077.005 - Magazine Subscriptions - was TABLED until the September meeting.

TREAS. RPT. RECEIVED

The Treasurer's Report for June 1976 has been received by the Board of Education.

CONTRACT AWARDED TO WE TRANSPORT

On motion of Mr. Nessim, and seconded by Mrs. Fasulo,

(EXCERPTS FROM BOARD MEETING MINUTES 7/28/76)

RESOLVED, that WE Transport be awarded the contract for transportation of nine (9) pupils to Chaminade High School for the school year 1976-77.

Unanimously carried Ayes 7 Nays 0

SALARY SCHEDULES APPROVED

On motion of Mr. Martin, and seconded by Mrs. Fasulo,

RESOLVED, that Salary Schedules #40, #33, and #29 be approved as listed in attached Business Administrator's Report.

Motion carried Ayes 6 Nays 0 Abstentions 1 (Hughes)

TRANSFER OF FUNDS APPROVED

On motion of Mr. Hughes, and seconded by Mr. Nessim,

RESOLVED, to approve the transfer of funds for year ending June 30, 1976, as presented.

Unanimously carried Ayes 7 Nays 0

BLDGS. & GROUNDS RPT. RECEIVED

The Board of Education has received the Buildings and Grounds Report dated July 8, 1976.

BOOK ISSUE

Action on Books Reviewed by Committee and Board of Education

1. SLAUGHTER HOUSE FIVE — Kurt Vonnegut, Jr.
Committee Vote — 4 to Retain — 4 to Remove

On motion of Mr. Melchers, and seconded by Mr. Nessim,

RESOLVED, that the book *Slaughter House Five* be removed from elementary and secondary libraries and for use in the curriculum.

Unanimously carried 7 to Remove 0 to Retain

2. THE NAKED APE — Desmond Morris
Committee Vote — 2 to Retain — 6 to Remove

On motion of Mr. Hughes, and seconded by Mr. Martin,

RESOLVED, that the book *The Naked Ape* be removed from elementary and secondary libraries, and for use in the curriculum.

Unanimously carried 7 to Remove 0 to Retain

3. DOWN THESE MEAN STREETS - Thomas Piri (sic)
Committee Vote — 3 to Retain — 5 to Remove

On motion of Mr. Hughes, and seconded by Mr. Melchers,

RESOLVED, that the book *Down These Mean Streets* be removed from elementary and secondary libraries, and for use in the curriculum.

Unanimously carried 7 to Remove 0 to Retain

4. SOUL ON ICE — Eldridge Cleaver
Committee Vote — 4 to Retain — 4 to Remove

On motion of Mr. Martin, and seconded by Mr. Melchers,

RESOLVED, that the book *Soul On Ice* be removed from elementary and secondary libraries, and for use in the curriculum.

Unanimously carried 7 to Remove 0 to Retain

5. BEST SHORT STORIES BY NEGRO WRITERS - Langston Hughes
Committee Vote — 5 to Retain — 2 to Remove — 1 Abstention

On motion of Mr. Hughes, and seconded by Mrs. Fasulo,

RESOLVED, that the book *Best Short Stories by Negro Writers* be removed from elementary and secondary libraries, and for use in the curriculum.

Unanimously carried 7 to Remove 0 to Retain

6. GO ASK ALICE — Anonymous
Committee Vote — 7 to Retain — 1 to Remove

On motion of Mrs. Fasulo, and seconded by Mr. Hughes,

RESOLVED, that the book *Go Ask Alice* be removed from elementary and secondary libraries, and for use in the curriculum.

Motion carried 6 to Remove 1 to Retain on a Restricted basis (Nessim).

Note: Books on a "Restricted" list would need parental approval for use by a student.

7. LAUGHING BOY — Oliver LaFarge
Committee Vote — 8 to Retain — 0 to Remove

On motion of Mrs. Fasulo, and seconded by Mr. Melchers,

RESOLVED, that the book *Laughing Boy* be returned to the library shelves without restriction.

Unanimously carried 7 to Retain 0 to Remove

8. BLACK BOY — Richard Wright
Committee Vote — 8 to Retain — 0 - Remove

On motion of Mr. Martin, and seconded by Mrs. Fasulo,

RESOLVED, that the book *Black Boy* be returned to the library shelves on a restricted basis.

Motion carried — 6 to Retain on a Restricted basis
1 to Retain with no Restrictions (Melchers)

9. A HERO AIN'T NOTHING BUT A SANDWICH — Alice Childress
Committee Vote — 4 to Retain — 4 to Remove

On motion of Mr. Michaels, and seconded by Mr. Hughes.

RESOLVED, that the book *A Hero Ain't Nothing But A Sandwich* be removed from the elementary and secondary libraries, and for use in curriculum.

Motion carried — 5 to Remove — 2 to Retain on a Restricted basis (Martin & Nessim)

10. THE FIXER — Bernard Malamud
Committee Vote — 5 to Retain on a Restricted basis — 3 to Remove

On motion of Mrs. Fasulo, and seconded by Mr. Melchers,

RESOLVED, that the book *The Fixer* be removed from the elementary and secondary libraries, and for use in the curriculum.

Motion carried — 4 to Remove — 2 to Retain on a Restricted basis (Martin & Michaels) — 1 to Retain with no Restrictions (Nessim)

11. A READER FOR WRITERS — Jerome W. Archer

No action taken by the Committee due to the fact that only one copy was available and all members did not have an opportunity to evaluate it.

On motion of Mrs. Fasulo, and seconded by Mr. Michaels,

RESOLVED, that the book *A Reader For Writers* be removed from the elementary and secondary libraries, and for use in the curriculum.

Unanimously carried — 7 to Remove — 0 to Retain

OLD BUS. — NONE

Old Business — None

NEW BUS.

New Business

On motion of Mr. Martin, and seconded by Mr. Hughes,

Whereas, the Board of Education of Island Trees has been threatened with legal action by the New York Civil Liberties Union in an attempt to have the Board reverse it's decision on the book issue, and

Whereas, the Board of Education has been elected by the resi-

dents of Island Trees and charged with the responsibility and control of the local School District as their elected representatives, be it therefore

RESOLVED, that the Island Trees Board of Education takes strong opposition to the attempted usurpation by the New York Civil Liberties Union, of the right of local control of schools by district resident, (sic) and be it further

RESOLVED, that the Board of Education of Island Trees does not now, or in the future, intend to let this, or any other organization, board of trustees, or individual from outside the district, pressure or intimidate this Board in its decision making or the operation of the schools.

Unanimously carried Ayes 7 Nays 0

Additional statements regarding the American Civil Liberties Union made by Mr. Martin and Mr. Ahrens are attached to the official minutes of this meeting.

On motion of Mrs. Fasulo, and seconded by Mr. Nessim,

RESOLVED, to adjourn the meeting at 10:30 P.M.

Unanimously carried Ayes 7 Nays 0

Respectfully submitted,

Isabelle Wirkula
District Clerk

Minutes approved:

EXHIBIT A-15

Annual Meeting of the Taxpayers of the Island Trees Union Free School District, Town of Hempstead, County of Nassau, Levittown, New York, was held in the Auditorium of the Island Trees High School, Straight Lane, Levittown, New York, Tuesday, May 24, 1977.

The meeting was called to order by the President of the Board of Education, Mr. Richard Ahrens, at 8:05 P.M.

PRESENT: Mr. Richard Ahrens, President
Mr. Frank Martin, Vice President
Mrs. Christina Fasulo
Mr. Patrick Hughes
Mr. Richard Melchers
Mr. Richard Michaels
Mr. Louis Nessim

Also Present: Mr. Walf H. Oglesby, Superintendent of Schools, Mr. Eugene Reilly, Assistant Superintendent for Business, Mr. Richard Segerdahl, Assistant Superintendent for Curriculum and Instruction, Mr. George W. Lipp, Jr., Chief Legal Officer, Mrs. Isabelle Wirkula, District Clerk, Mrs. Rita Barbour, Assistant Business Manager, and Mrs. Claire Thompson, Statistical Clerk.

CHAIRMAN APPOINTED

On motion of Mr. Nessim, and seconded by Mrs. Fasulo,

RESOLVED, to appoint Mr. Donald Ferris as chairman of the annual meeting.

Unanimously carried Ayes 7 Nays 0

BUDGET REVIEWED

Mr. Walf Oglesby reviewed the budget page by page, and the taxpayers were permitted to ask questions.

MTG. ADJ.

The meeting was adjourned at 10:40 P.M., May 24, 1977.

MTG. RECONV.

The meeting was reconvened at 12:00 Noon on May 25, 1977.

BUDGET & TRUSTEE ELECTION RESULTS

Budget and Trustee Election results:

BUDGET: YES 1167 NO 556

TRUSTEES:

Mr. Richard Ahrens 1011

Mr. James Hamilton 897

Mr. Michael Kmetz 894

Mr. Frank Martin 1015

Total number of voters: 1939

The meeting was adjourned at 9:30 P.M.

Respectfully submitted,

Isabelle Wirkula
District Clerk

Minutes approved:

EXHIBIT A-16

(THE NEW YORK TIMES 5/22/77)

After 14 Months, a Vote on 'the Books'

By Ari L. Goldman

LEVITTOWN—More than a year after the small Island Trees School District here gained national prominence—some notoriety—for banning nine books on library shelves, the book issue has yet to go away.

Legal issues are still being argued in the courts and the educational implications are still being debated by parents, students and teachers. The candidates in this Wednesday's school-board election initially said that the book banning would not be an issue in the campaign, but "the books" come up in almost every conversation and campaign speech.

"The board of education hasn't been representing the people in the community," said Michael Kmetz, who, together with James Hamilton, is challenging the president and vice president of the school board. "The perfect example is the books."

"The books" has become the catch-all phrase for the action by the school board last March in removing nine titles from the school library shelves. The board found that the books contained "material which is offensive to Christians, Jews, blacks and Americans in general." Among the volumes were "Slaughterhouse Five" by Kurt Vonnegut, Jr.; "The Fixer" by Bernard Malamud, and "Down These Mean Streets" by Piri Thomas.

"When I decided to run I really didn't feel that it was an issue," said Mr. Hamilton, a department-store manager, who has been campaigning door-to-door in the community. "But it seems

wherever we go people ask, 'Where do you stand on the books?' "

One person who is not discussing the books is Walf Oglesby, the school district superintendent. When asked recently for an interview to discuss the book issue and the May 25 election, Mr. Oglesby said he would not be available for comment until June 1.

But Richard Ahrens, the school board president, was willing to defend what he and the other board members did in March 1976. "We're not ashamed of what we've done," he said in an interview. "We stand by our convictions. These particular books have no business being in a senior high school. They are educationally unsound."

Moreover, Mr. Ahrens said, the school board has the support of the community on the book issue. He cited a recent district-wide poll wherein 70 percent of those who responded favored the board's action. "It has been widely distorted in the newspapers that the community is split on this issue. That is not so. They are behind us."

"We're not going to be pressured by the press or by the A.C.L.U.," he added.

Last January, the American Civil Liberties Union brought a class-action suit on behalf of Island Trees students in State Supreme Court in Mineola. The suit contends that the book ban violates the students' freedom of speech and academic freedom.

The United Teachers of Island Trees has also filed a grievance with the state, asserting that the academic freedom of the teachers has been violated.

Mr. Hamilton and Mr. Kmetz, the challengers, maintain that

community sentiment is against the book ban and the way in which it was carried out. Mr. Hamilton said that a referendum should have been held before the board's action. He added that this Wednesday's election "will be as good as any referendum" on the book issue.

Both men have taken a stand against book bannings. "You don't corrupt a child by giving him too much knowledge," Mr. Hamilton said. "Books such as these give children a picture of the world that they don't see in Island Trees."

The Island Trees School District takes in a 2.5-square mile slice of a largely Italian and Irish section of Levittown. The community is almost exclusively white. The school district, with about 3,700 pupils, is one of Nassau County's smaller districts, and the new school budget of $11.7 million is one of the lowest in the area. The budget approved earlier this month resulted in a relatively small increase of 86 cents in the tax rate, bringing it to $17.59 per $100 of assessed valuation.

Economy is the major plank in the re-election campaign of Mr. Ahrens and the vice president of the board, Frank Martin. "We've cut all the fat out of the budget," Mr. Ahrens said. "And when it comes to negotiating new contracts [with the teachers union] we just don't roll over and play dead. We're not opposed to them making money, but the people of Island Trees have limits and we're at it right now."

"Sure they've kept the budget low," Mr. Kmetz said, "but it's been at the expense of education." Mr. Kmetz, who is challenging Mr. Martin, said that many courses, such as advanced German and French, had been phased out and that many good teachers had been laid off. He also criticized the school lunch program for emphasizing cheap "junk food" rather than a more nutritious

menu.

Mr. Ahrens, however, maintained that the policies of the board had resulted in better pupil performance. "We are getting back to basics," he said, "better reading, better arithmetic, better discipline." Recently, he said, the board found out that three different reading programs existed in the elementary schools. The board replaced them with what he called "time-tested programs from 50 or 60 years ago." The district saved money on new books and reading materials, and at the same time reading and math scores improved, he said.

A teacher, who like others at the school asked not to be identified, acknowledged that there had been some recent improvement in student test scores. "But scores have a limited value, they are not everything," she said.

"The school board believes that if they can show that the children are testing well, then everything is all right," she added. "But scores don't show comprehension, depth, creativity or reasoning. They don't measure the development of the intellect. Tests show skills, not application."

The teacher said that the school administration had "squeezed out any kind of creativity" at the schools in the Island Trees district.

As a result of austerity, she said, children are using science books that talk about, "some day, when astronauts get to the moon...."

"The district can afford three full-time attorneys to work on all the lawsuits, but they can't spend money for up-to-date books for the classroom."

The legal struggle has become complex in recent weeks as lawyers for the school district have tried to move the A.C.L.U. suit to Federal Court. According to Alan Levine, a lawyer for the Civil Liberties Group, the A.C.L.U. brought the case in state court because several years ago the actions of a school board in Queens in banning "Down These Mean Streets" was upheld by a Federal Court. There is another precedent, however, in a recent Ohio case where a Federal Court found that a school board had no right to bar from the school library "Slaughterhouse-Five" and Joseph Heller's "Catch-22".

Mr. Levine said that the Island Trees case had been brought in state court in the hope that the issues would be "freshly examined." The A.C.L.U. suit contends that the school board has violated the state constitution's guarantees of free speech.

Many students and teachers at the school district are looking toward the outcome of the upcoming election and the outcome of the lawsuit to end what one teacher at the school described as "the bitterness here."

Janet Renke, a senior and editor of the high school newspaper, said that there was "a lot of potential for good things" in the school district. "We've had enough turmoil here for a long, long time," she said.

The New York Times, Sunday, May 22, 1977

EXHIBIT A-18

BOARD OF EDUCATION
Island Trees Union Free School District
Town of Hempstead
Island Trees 3, Levittown, N.Y. 11756

I have _____ students attending the Island Trees Public Schools.

_____ of them are under 18 years of age.

As parents of these students

_____ I support _____ I do not support

the Board's action removing the books in question from the school libraries and curriculum.

_____

Signature

PLEASE RETURN BY FEBRUARY 1.

EXHIBIT A-19

ISLAND TREES NEWSLETTER
District Office: M.F. Stokes School, Island Trees 3, Levittown

March, 1976

Dear Residents,

The entire contents of this special newsletter will be devoted to the library book issue. The reasons for the newsletter are two-fold. First and foremost, to correct the lies and misinformation which has been spread by the teachers' union regarding the way in which the books in question were removed from the libraries. The union (Mr. Walter Compare, President, in particular) and some of the news media would have you believe that two board members, under the cover of darkness, did actually sneak into the library and remove the books from the shelves, and cards from the card catalog. This is an outright, absolute and deliberate lie. What did, in fact, happen was that the books in question were collected by administration so that they might be reviewed by the board. (See copy of memo from Mr. Ahrens to Dr. Morrow page 3). What's more, Mr. Compare knew it. We refer you to the news story in the Long Island Press of March 20, 1976. We quote the Press: "...said the union president. He also denied that any union members knew about the board's plan until March 3 when the board directed the Superintendent, Richard Morrow, to collect selected books for review." So you see, even though Mr. Compare was fully aware that the board had directed the superintendent to remove the books in question as early as March 3, he still went ahead and deliberately give false information to the N.Y. Daily News on March 18, a full day before they even presented the board with their so-called grievance. Mr. Compare has once again demonstrated that he will stoop to any level to discredit this board of

education—and outright lies seem to be the union's favorite tactic.

The second reason for this newsletter is to clear up the issue itself. With all the sensationalism surrounding the alleged way that the books themselves were removed from the library, the real issue of whether the books belong in the school library, and who should decide whether or not they do, seems to have been completely forgotten. We must emphasize the fact that what we are talking about here is *not* censorship. No member of this board has advocated that these, or any other books, be taken out of *all* libraries, or *all* book stores. What we are talking about is excluding objectionable reading material from our school libraries—if they are found to be objectionable.

The next question is, who makes the decision? Does the news media decide from which books your children are taught? Should it be the people who award Pulitzer prizes? Or, maybe it should be today's dedicated teacher union leaders? We believe that not even the professional educators and educational administrators have a right to usurp the parents' authority in these matters. We fully support the N.Y. State Education Law (Sec. 1709 Sub. (3)(4)(5)) which states that the parents are the ones who should select the books, and all other educational materials their children use. This is done through the democratic process by their elected representatives on the board of education. God help all of us if the parents should ever lose this authority.

We ask the people of the district to read this newsletter and to attend the Board Meeting on Tuesday, March 30, at 9:00 P.M. You will have the opportunity to examine the books yourselves. These books do have objectionable passages in them, and whether or not you find them personally offensive, we are sure that you will

agree that the material will offend a large segment of our district's residents. But please, you decide! Don't let a journalist or a vindictive teachers' union president decide for you. It is a far too important issue!

ISLAND TREES NEWSLETTER
March 1976
Page 3

ACADEMIC FREEDOM

The teachers' union has filed a grievance against the board of education stating that we, the board, have violated the Academic Freedom Clause of their contract, and the District's Croft Manual.

We quote from the teachers' contract: "Accordingly, it is agreed that teachers shall have the right to introduce and explore controversial material, provided only that the material and the manner in which it is presented *are in good taste, appropriate to the grade level,* and *relevant to course content."*

The Croft Manual states: "The school libraries should contribute to development of the *social, intellectual and spiritual values of the students."*

We on the board of education believe that the material in some of these books is in direct violation of these clauses. It is our contention that this material is *not* in good taste and does nothing but harm to the intellectual and spiritual values of the students. But don't take our word for it. Again, we invite the parents to the meeting of March 30, 1976 to see for themselves. We, the board of education, have every confidence in their judgment.

ABOUT OUR TEACHERS

Mr. Compare is fighting to keep books in our schools which are offensive to Christians, Jews, Blacks, and all Americans in

general. One such book refers to Jesus Christ as a "bum with no connections." One must ask himself what motivates this man? We, the board, know that if we spoke of, or to, Christians, Jews or Blacks the way they are referred to in these books, we would find ourselves in court. Why then does Mr. Compare insist that these books remain in the hands of our children. Maybe it's just lust for power that motivates the man.

This whole issue could have been taken care of within our school system. Instead, thanks to Mr. Compare, it has been distorted and blown all out of proportion by the news media and radio. This is not the first time Mr. Compare has attempted to discredit the board at the expense of our school system, and we are sure that it won't be the last.

We urge the residents of this district NOT to judge all of the teachers by the irresponsible actions of their union leaders. Most of our teachers do a fine job of teaching our children, and we are sure that they will continue to do so.

MEMO referred to on Page 1 (dated March 3, 1976):

TO: Dr. Richard Morrow
FROM: Richard Ahrens
RE: LIBRARY BOOKS

It is the board's desire that *all copies* of the library books in question be removed from the libraries to the board's office, at the rear of the Residents' Reference Room in Stokes, for review by the board, after which we will decide whether or not a committee is necessary in this matter.

Thank you.

R.A.

cc: Board members

ISLAND TREES NEWSLETTER

Island Trees over the past few years has become an extremely calm and productive school district. Where Island Trees was once used as an example of how a school district shouldn't be run, the exact opposite is now the case.

As recently as last week, the Levittown Tribune saw fit in an editorial to refer to your board of education as "questioning, diligent and economy minded" — and there are those who would see this progress destroyed for their own selfish reasons—whatever they may be.

Only you, the parents and taxpayers, can prevent this.

* * * * * * *

ATTEND THE NEXT —

REGULAR MONTHLY BOARD MEETING
TUESDAY, MARCH 30, 1976
9:00 P.M.
GENERAL PURPOSE ROOM, M.F. STOKES SCHOOL
Owl Place & Condor Road, Levittown

BOARD OF EDUCATION
Island Trees Union Free School District
Town of Hempstead
Island Trees 3, Levittown, N.Y. 11756

SPECIAL EDITION

EXHIBIT A-21
(BOARD LETTER 8/6/76)
BOARD OF EDUCATION
ISLAND TREES UNION FREE SCHOOL DISTRICT
TOWN OF HEMSPTEAD
ISLAND TREES 3, LEVITTOWN, N.Y. 11756
(516) 731-4020

First of all, as was printed in every major daily newspaper in the New York area, and our local Levittown papers as well, NO member of the Island Trees Board of Education—at any time—day or night—entered any library and removed even one single book from the shelves, let alone 60 of them. WCBS was well aware of this fact, but chose to ignore it.

As for the books themselves, we will not be encouraging our young people to bed down with them as WCBS has suggested. We do, however, encourage all parents to read them.

And from the seven members of the Island Trees Board of Education, there will be no apologies, no shame—and most of all—no regrets. And should a similar situation arise again in the future, we will not hesitate to take the exact same action again, and again.

What is taught in schools is a reflection of the values of a society, in this instance the local community. One of the purposes of a Board of Education is to see that local control is maintained and that the will of the majority prevails.

Teaching tools and curriculum are a definite reflection of community values. Most parents have high values for their children and it is not a function of the school to taint, tarnish or diminish these values.

Many doctors, psychologists and child development specialists contend that brutal material is damaging to young minds. WCBS stated that the film "Slaughterhouse Five" was recently shown on TV for the umpteenth time, and on each of those umpteen times it was edited for television—so whey not condemn television for censorship. And while we are at it let's condemn the FCC for its regulations which forbid the use of obscenities and vulgar language in public broadcasting.

And why not an editorial belittling the zealots who rate movies "R" and "X"—because the material in these movies is simply not suitable for the young, impressionable mind—that's why not! And books are no different than movies—Pulitizer Prize winner, or not.

Education is supposed to be an uplifting experience, but if you have to get down into the gutter to do it then it is just not worth it, for as the twig is bent, so grows the tree.

Richard J. Ahrens
President
Board of Education
Island Trees Public Schools

August 6, 1976

ISLAND TREES NEWSLETTER

JANUARY 1977

Dear Residents,

During the course of any given school year the Board of Education is called upon to make many decisions. Most of these decisions are routine, and generally go unnoticed by the residents. This past year the Board of Education had to decide on the fate of eleven books with respect to the *School Libraries*, and their use in the classroom as teaching materials.

After reading all the books in question the Board felt that nine of the eleven books were inappropriate to the grade level in which they were used, were not relative to course content, and could not be presented in good taste. The Board was, therefore, compelled to remove these books from use in the school libraries and from classroom use.

On January 3, 1977 four high school students, and one junior high school student, and their parents, represented by the N.Y. Civil Liberties Union, filed suit against the Board of Education. They are Steven Pico and Frances Pico; Jacqueline Gold and Rona Gold; Russel Rieger and Samuel Rieger; Glenn Yarris and Richard Yarris; and Paul Sochinski and Harry Sochinksi. The suit claims to be speaking on behalf of all of the students in the junior and senior high schools and alleges that their civil rights were violated by the Board's action. This suit also asks that the legal fees of the ACLU attorneys be paid by the school district.

We on the Board of Education in this case make no apologies, feel no shame and, most of all, even in the face of all of the abuse that has been heaped upon us over this issue—mainly by the

liberal news media—have no regrets whatever for our action.

What is taught in schools is a reflection on the values of a society—in this instance the local community. One of the purposes of a Board of Education is to see that local control is maintained, and that the will of the majority prevails. Teaching tools and the courses of study taught in the schools of a community are a definite reflection of the values of that community. Most parents have set high standards for their children, and it is not a function of the school to taint, tarnish, or diminish those values.

As for the language used in these books, we are not talking about words such as hell and damn. We are talking about the most repulsive and vulgar language you can imagine, as well as violence, explicit sex and homosexuality. We believe that to use this type of material on and junior and senior high school grade levels would be an educationally unsound practice. (sic) When you come right down to it, the end result of this suit will determine who will decide what is best for the students of Island Trees—the Civil Liberties Union, the authors and publishers who are looking to sell books, or the parents whose children would be using these books. On that point, every school district in the country has a stake in this case.

We agree with a U.S. Commissioner of Education, T.H. Bell, who stated: "Parents have a right to expect that the schools in their teaching approaches and selection of instructional materials will support the values and standards that their children are taught at home, and if the schools cannot support those values, they must at least avoid the deliberate destruction of them."

Any opinions you, the parents and taxpayers of Island Trees, might have on this matter would be most appreciated. Thank you.

Your Board of Education

ISLAND TREES NEWSLETTER

Page 2

TO ALL THE PARENTS IN ISLAND TREES:

You have no doubt heard by now of the lawsuit commenced by the parents of five of our students, on behalf of their children, to set aside our action regarding the library books. Our comments are contained in the letter on the preceding page.

The lawsuit alleges that these parents, and their children, are speaking on behalf of all of the children of the district. Our attorney has asked us to ascertain if this is in fact correct. If this lawsuit is not supported by all of you, it is important to let the Court know.

We have been asked, therefore, to have the parents of all students under 18 years of age to answer the brief questions on the postcard enclosed and *to return it to us by FEBRUARY 1*. The response will be helpful to us in the lawsuit, and we appreciate your assistance. Please be assured your identity will be kept confidential.

Thank you,
Your Board of Education

Left to right: Lori Geffon, Gallow School; Susan Skaling, Stokes School; William Egan, Sparke School, and Christopher Orlando, Karopczyc School.

These students will now go on to compete against other students from surrounding communities.

Good luck to each of them!

NEW STATE TRAFFIC LAW!!!

Effective January 1, 1977, a new State law permits drivers to execute a **RIGHT** turn after stopping at most red lights. This marks a change from the current law.

Under the new law, a motorist may make a **RIGHT** turn after stopping at any red light unless the intersection is posted with a "No Turn on Red" sign. All pedestrians, especially school age children, should be alerted to this change and should be advised to look for turning vehicles when crossing. We suggest that you discuss this thoroughly with your youngsters.

PRE-SCHOOL SCREENING FOR HEARING IMPAIRMENT

The Island Trees Council of PTA's is sponsoring this free screening for all Island Trees children born between December 1, 1971 and November 30, 1973. The major goal for this project is to provide early identification of children with hearing impairment. Please watch for further information in elementary school newsletters.

EXHIBIT B

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
Docket No. 77 C 217

DISTRICT COURT OF THE UNITED STATES
EASTERN DISTRICT: NEW YORK
(Title Omitted)

STATE OF NEW YORK:
COUNTY OF NASSAU: ss.

FRANK A. MARTIN, being duly sworn, deposes and says:

1. That I am Vice President of the board of education of the Island Trees Union Free School District and I have served in such position for two years. I have been a board member for three years.

2. I subscribe to a basically conservative philosophy, especially with regard to fiscal matters, morals and the place of education in our society. I feel that my six fellow board members feel the same way and further that this is representative of our community.

3. On September 19, 20 and 21, 1975 I attended a conference sponsored by PONY-U, an organization interested in educational affairs in New York State, together with Richard Ahrens and Patrick Hughes, fellow board members. At the conference I came across materials which listed a number of books considered to be improper fare for school students due to obscene language. (See exhibit "A-1"). I obtained these materials and brought them back

to Long Island with me. I did nothing further for quite some time since I didn't believe our district contained the books listed. However I made a list of just the titles (See exhibit "B-1") of these volumes. I had mentioned the possibility of some of the material being in our district schools to Mr. Ahrens and one evening (November 7, 1975) while we were at a school affair, I suggested we check the library card index file to ascertain if, in fact, any of the volumes I had on the list (which I had brought with me) were in our library. As set forth in Mr. Ahrens' affidavit accompanying this we did check and found that some (9) of the books were in our Senior High School Library.

4. I have read carefully the affidavit of Mr. Ahrens accompanying this (exhibit "A" through "A-23") and wish to reaffirm, reiterate and restate all of the facts contained therein with regard to the actions of the board of education, superintendent and staff as well as of the committee to review the books as if I had set them out in full herein.

5. I do, however, wish to make a few additional points. Throughout the course of the time encompassed by the board actions, committee review and subsequent litigation (including an academic freedom grievance still awaiting decision) as well as two contested school elections I have been subjected to enormous personal pressures by the media as well as members of the public in general for the position I have taken. I am amazed therefore that the same media representatives have refused to reprint the offensive materials which came to my attention in the first place. This refusal extends to the Congressional Record of the United States which, when Rep. Norman Lent submitted excerpts for reprinting, refused the material for the first time in its history stating that it did not wish the Record to become a pornographic document. I annex a statement made to the media (exhibit "B-2") on January 11 of this year which quite accurately expresses my

feelings.

6. I also draw the Court's attention to the fact that "The Fixer" was originally approved by the Island Trees Board of Education as a textbook in 1972 (See exhibit "B-3"). Certainly if the board has the power to approve a book it has the power to disapprove, even if that means overruling a prior approval. This is the nature of corporate action. Just because a resolution is once passed it is not irreversible. Neither a textbook nor a library book have tenure. They are both part of the curriculum of a district and the board has the right to change curriculum. The Regents Guidelines make no distinction between textbooks and library books (exhibit "A-10"). The board annually approves a list of periodicals for renewal of subscription. On numerous occasions a periodical has either been added or deleted due to the philosophy of education espoused by the board. There is a constant culling of library books that goes on. Granted that this is the first time that specific books have been removed because of objection to obscene passages and a belief of lack of relevancy and educational value, but that does not make it unconstitutional. It is just that I, for one, did not realize these materials were on our shelves.

7. I admit that well intentioned persons might disagree with me. Let them serve on boards of education in other communities where they would receive the support of the community, but don't permit them to force their choices and values on me and the majority of my community when they have already been defeated twice at the polling place. I have read all of the books concerning which I cast a vote (four of them prior to the request that they be placed in the board room) and I have, in my opinion, cast a deliberate, well reasoned, intelligent vote. I did not do so on religious grounds, although I admit that the references to Christ in "Slaughterhouse Five" are, to my mind, blasphemous and anti-Christian. No one could think otherwise. There were no references

to religion that I recall in any of the other books except a minor one concerning Jews as a race in "The Fixer". These books in my opinion are just improper educational fare and are full of obscenities.

8. Someone has to make the decision regarding curriculum. texts. library books and other instructional materials in a school district. If it is not the board of education it must be someone on the professional staff. The professional staff has tenure—the board members can be removed by the electorate. The board members must. by law. be residents of the school district. The professional staff need not be. In fact. in Island Trees 95% of the professional staff are non-residents of the community. How can community values be inculcated in its student population if these important decisions are left to the professional staff. only 5% of whom are members of the community?

9. I have personal knowledge of the matters hereinabove referred to.

FRANK A. MARTIN

JURAT

EXHIBIT B-1

OBJECTIONABLE BOOKS

Breakfast of Champions — Kurt Vonnegut, Jr.
Slaughter House Five — Do
Blueschild Baby — George Cain
Talk Show
"Our Bodies, Ourselves"
Soul on Ice — Eldridge Cleaver
A Hero Ain't Nothing But a Sandwich — Alice Childress
The Fixer — Bernard Malamud
The Godfather — Mario Puzo
Loophole — Robert Pollock
Go Ask Alice
The Addict in the Street — J. Larner & R. Tefferteller
The Onion Field — Joseph Wambaugh
Dictionary of American Slang
Growing Up Absurd — Paul Goodman PHD
Why I Am Not A Christian — Bertrand Russell
A Nation of Nations
Inside Prison, American Style — R.J. Minton
The Best Short Stories by Negro Writers — Langston Hughes
Real Magic — P.E.I. Bonewits
Black Boy — Richard Wright
Laughing Boy — Oliver LaFarge
Black Rage — W.H. Grier & P. Cobbs
The Naked Ape — Desmond Morris
Our Sexual Revolution — Helen Colton
A Reader for Writers—A Critical Analogy of Prose Readings — Jerome W. Archer

Mass Media and The Popular Arts — Rissover/ Birch
Unknown Worlds — Holt, Reinhart & Winston
Loyalties Whose Side Are You On
Revolution Road
Down These Mean Streets — Thomas Piri
Law and The Consumer — Richard Yates

EXHIBIT B-2

BATTLE OF THE BOOKS IN ISLAND TREES

By the Island Trees Board of Education

TUESDAY, JANUARY 11, 1977

Newsday

The Island Trees Board of Education is the subject of a lawsuit by the American Civil Liberties Union on behalf of five students and their parents. The supposed reason for this class action suit is the board's ordered removal of nine books from the school libraries because they found the books educationally unsound.

The real issue at stake in not nine books, 90 books, 900 books, nor even one book. The ACLU couldn't care less about any individual work of literature, or any particular author. If it did, they would have to insist that every book ever printed be made available in every school library—a situation of impossible magnitude.

Every library has only so much space on the shelves and a limited amount of money to purchase books. Therefore, some selection process has to take place. Someone has to decide which books will be purchased.

In the normal selection process, where the head librarian or the professional staff passes over thousands of books, one never hears the charge of censorship.

But let a parent, taxpayer or board of education override the selection of a particular book, and all hell breaks loose. Charges of "censorship," "book burning," "vigilante" action and violations of freedom of speech are hurled about.

When the smoke clears, it is usually the students, parents and

taxpayers who have gotten burned. If this selection process is necessary, shouldn't we in the field of education insist on the very best for our own children—indeed, the children of this great nation.

You may wonder why we have referred to the children of the entire nation. Make no mistake about it, this action in Island Trees has national significance. Every board of education, and every parent, has a stake in the outcome of this lawsuit.

For the past decade, the ACLU has moved into schools all over the country, ostensibly on behalf of some student or teacher who feels that his or her constitutional rights are somehow being violated because a school has a dress code, a hair length code, a strict approach to discipline or standards of decency in the curriculum. When the ACLU manages to get a favorable decision for its client, in overturning some standard or code, the case then sets a precedent for all school districts throughout the land.

Almost always these court decisions have resulted in the loss, to some degree, of the control of the schools by the people who fund them, and the standards of the public schools across the nation have been reduced to practically nil.

Well, we in Island Trees have had enough; and as long as the people continue us in office on the board of education, we intend to do all in our power to protect the standards of our schools and the values of the children who attend them.

Our stand against these books and the ACLU has made us the natural enemies of the liberal media who are doing all they can to discredit us. We have been criticized editorially time and again, when all we are doing is demanding that the schools abide by the same standards of decency which govern what is printed in

Newsday and the Congressional Record. When Rep. Norman Lent (R-East Rockaway) submitted excerpts of the banned books for reprint in The Congressional Record, the publication refused. The reason given was that officials did not want the Record to become a "pornographic document."

We on the board suggest that it would be a public service for the media to permit the public to judge the merits of this case by printing the offending passages instead of protecting the adult public from this material, while encouraging the attack upon parents who wish the same protection for their vulnerable children.

Even if some parents feel that these particular books are not personally offensive to them, how long will it be before some student or small group decides that their rights are being violated because the school board refused to order Penthouse, Hustler or Screw for their reading pleasure?

Does the ACLU drag us to court to have some judge decide that we must pander to the erotic tastes of a particular individual at the expense of the taxpayers? Who decides? Who must set the standard, below which we will not go—the ACLU, the authors who are looking to sell books or the parents whose children use these books?

The courts have stated in recent decisions that the community should set its own standard of decency. The law is clear: The selections of books and curriculum material rests with the local board of education, the elected representatives of the people.

We on the Island Trees Board of Education believe in majority rule, with protection of minority rights. The majority of residents in Island Trees do *not* want these books in their schools—the

majority rules. The minority is still free to obtain these books at the public library, in stores and on newsstands.

No one's constitutional rights have been violated in Island Trees. Our schools are preparing our children to become decent contributing members of society—*not* to live in the gutters and jails of our nation!

The members of the Island Trees School Board are Richard Ahrens, president; Frank Martin; Christine Fasulo; Patrick J. Hughes; Richard Melchers; Richard C. Michaels and Louis Nessim.

EXHIBIT B-2

Newsday, January 11, 1977

By Barbara Bernstein
and Alan H. Levine

In a column about the removal of nine books from the school libraries in Island Trees, Patrick Owens argued that the school board is merely exercising its legal authority to pick and choose books and that the answer to the board's banning is not to bring a lawsuit but to "throw the yokels out." We disagree. Consequently, the New York Civil Liberties Union has filed suit claiming that the school board's action is a violation of both the state and federal constitutions.

The Island Trees controversy is not to be resolved by popular votes. This is not the typical clash about budget, school construction or educational philosophy, all of which are the stuff of school board elections. We would agree that the way to protest a school system's overly traditional approach to the classroom is not through the courts, but by the ballot. But *no* school board has the right to invoke *any* educational philosophy to justify purging its curriculum and libraries of books it deems offensive.

In doing that, the Island Trees School Board has not only abdicated its responsibilities under the state's education law, but has run roughshod over the constitutional guarantee of free expression. While state law gives broad discretion to school boards, it certainly intends, at a minimum, that students will be able to confront and debate controversial ideas. Surely no part of that discretion permits a school board to purge ideas it finds offensive.

Free, public education in this country found its roots in the impulse to be rid of religious faction and religious tyranny. Only

by a mix of different languages, cultures and beliefs can democracy thrive. Do we really want our students, who are old enough or almost old enough to vote, to drive, to marry and to fight and die for their country, to be unprepared to confront life different from theirs, to be ignorant of life in the ghetto, of the horrors of drug addiction, of the physiology of sex, of the effects of racial and religious hatred and hypocrisy? Would our public schools be worth one small fraction of what we pay for them if students were permitted to read and discuss only those ideas acceptable to a popularly elected school board?

It is with such concerns in mind that courts have evolved a constitutional principle of academic freedom to protect free speech in the classroom. Recognizing the whims of popular sentiment to which school boards are vulnerable, the courts have deprived the state—and its school boards—of the power to prohibit teachers and students from reading and discussing certain materials merely because they may offend public sensibilities.

When a school board decides that certain ideas may not be discussed in its schools, the victims of that action need not wait for the next election. Indeed, the recent election in Island Trees, in which the present school board was retained, confirms the obvious, that such illegal actions are often very popular. Controversial ideas do not win elections, any more than do people who express them. The vigorous protests of a vocal minority in Island Trees were simply insufficient to overcome the majority's indifference to or approval of the book banning. How many generations of students in that school district must be deprived of the opportunity to read allegedly offensive books until their parents are finally able to win an election?

Fortunately, constitutional rights are not dependent on the popular will, but are assured whether or not an electoral majority

wishes to revoke them. If minorities had to win elections in order to secure their rights, our schools might still be segregated, political dissidents might still not be permitted to distribute their literature and state legislatures apportioned by 19th Century census figures might still run our states.

It has to be asked, that if removing these nine books is unconstitutional, could no book ever be removed, books like "The Joys of Oral Sex" or the anti Semitic tract, "The Protocols of the Elders of Zion," if a school board should discover them in a school library? Probably the former could be removed. If its contents are as explicit as its title suggests, it is likely to be legally obscene for minors and therefore subject to removal.

As for "The Protocols," the school board should indeed be barred from removing it. What legitimate educational purpose could that possibly serve? Would it stem the tide of anti-Semitism? Hardly. To the contrary, the success of documents like "The Protocols" depends entirely on an ignorant and uninformed citizenry prepared to believe its absurd lies. No, rather than remove "The Protocols," we would have students discuss it openly in their classrooms. And, so that they might better understand the capacity of anti-Semitism to pervert justice and destroy lives, we would have them read Bernard Malamud's "The Fixer." Except that the Island Trees School Board has banned it.

Banning books whose ideas or language may be offensive is as primitive as killing the messenger with the bad news and equally as useful in dealing with the real world. It is one thing to ignore the bad news and remain ignorant, but it is another to force ignorance on others under the guise of protecting them. Thomas Jefferson said that no nation can remain ignorant and free and it is this confrontation that is being tested in Island Trees.

Barbara Bernstein is executive director of the Nassau chapter of the New York Civil Liberties Union. Alan H. Levine is staff counsel to the chapter and one of the attorneys for the Island Trees student plaintiffs.

EXHIBIT B-3

Minutes of the Regular Meeting of the Board of Education, Union Free School District #26, Town of Hempstead, County of Nassau, Levittown, New York. The meeting was held at the Michael F. Stokes School, Owl Place and Condor Road, Levittown, N.Y. on January 25, 1972.

The meeting was called to order by the Acting President, Mrs. Lillian Rosa, at 10:15 p.m.

PRESENT: Mr. Louis DiMitri
Mr. Robert Evans
Mrs. Lillian Rosa
Mr. Gordon Webb
Mr. Leo H. Miller, Superintendent of Schools
Mr. Eugene Reilly, Ass't. Sup't. of Schools
Mr. George Murphy, Administrative Assistant
Mr. Wm. Rowley, Attorney for the District
Mrs. Dorothea Griffin, District Clerk

PLEDGE: Mrs. Rosa led the pledge of allegiance to the flag.

MINUTES:
On motion of Mr. DiMitri and seconded by Mr. Webb,

RESOLVED, to approve the minutes of October 7th, 1971 as read.

Unanimously carried Ayes 4 Nays 0

For information purposes it was noted that while there had not been a regular meeting since Oct. 7th, 1971, the Board met on 11/3; 11/11; 11/16; 11/30; 12/13; 12/21; 12/27/71 & 1/12/72.

Correspondence:

Mr. Miller reported a letter having been received from a student regarding purchasing of recycled materials. This matter was refered to the Business Office.

REPORTS TO THE BOARD:

Mrs. Rosa reported that Mrs. Cullem attended the Teacher Salary Clinic in Liverpool on Jan. 10th & 11th and presented a detailed report which is attached to these minutes.

BUSINESS ADMINISTRATOR'S REPORT:

On motion of Mr. Webb and seconded by Mr. DiMitri,

Resolved to award contracts for the following bids:

TEXTBOOKS:

On motion of Mr. DiMitri and seconded by Mr. Evans,

RESOLVED, to approve a list of textbooks for the English Department of the High School d.d. 11/8/71; Social Studies and History list d.d. 9/17/71 which lists are attached.

Unaninmously carried Ayes 4 Nays 0

E.S.S. MATERIALS:

On motion of Mr. Evans and seconded by Mr. DiMitri,

RESOLVED, to approve the 212.300.908 code allotment for science material intended for a Kdg. and 1st grade program to be used instead for a program for grades K-6. This was recommended by Mr. Finkel.

Unanimously carried Ayes 4 Nays 0

RECREATION FUNDING:

On motion of Mr. Webb and seconded by Mr. Evans,

RESOLVED, that the Board of Education authorizes the Sup't. to file application with the Town of Hempstead Local Aid for recreation for $3,074.

Unanimously carried Ayes 4 Nays 0

TITLE I:

On motion of Mr. DiMitri and seconded by Mr. Evans,

RESOLVED, the Board of Education approves the Title I ESEA Budget of $29,875 for the JHS Tutorial and Elem. Non-English Speaking Programs.

Unanimously carried Ayes 4 Nays 0

TITLE II:

On motion of Mr. Webb and seconded by Mr. DiMitri,

RESOLVED, that the Board of Education hereby authorizes the Sup't. to file application for a grant of $5,560. under Title II, ESEA (P.L. 89-10) and such authorization is recorded in these minutes.

Unanimously carried Ayes 4 Nays 0

(EXCERPTS FROM BOARD MEETING MINUTES 1/25/77)

EXHIBIT B-3

ISLAND TREES HIGH SCHOOL
TEXTBOOKS RECOMMENDED FOR ADOPTION 1971-72

ENGLISH:

Sir Gawein and The Green Knight — (Translated by) James L. Rosenberg — Holt, Rinehart & Winston, Inc. — Gr. 10 H (Unit Cost $1.45; Quantity 35 each)

The Fixer — Bernard Malamud — Dell Publishing — Gr. 10 H & Mod. Lit. (Unit Cost $.95; Quantity 100 Each)

They Shoot Horses, Don't They? — Horace McCoy — Avon Books (The Hearst Corp.) — Mod. Lit. (Unit Cost $.95; Quantity 100 each)

To Sir, With Love — E.R. Braithwate — Pyramid Publications — Gr. 10 (Unit Cost $.75; Quantity 100 each)

The Lilies of the Field — William Barrett — Popular Library — Gr. 11 (Unit Cost $.50; Quantity 100 each)

The Catcher in The Rye — J.D. Salinger — Bantam Books — Gr. 11 (Unit Cost $.95; Quantity 100 each)

All the above are for classroom study for first semester.

EXHIBIT C

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Docket No. 77C 217

DISTRICT COURT OF THE UNITED STATES
EASTERN DISTRICT: NEW YORK
(Title Omitted)

STATE OF NEW YORK
COUNTY OF NASSAU ss.

CHRISTINA FASULO, PATRICK J. HUGHES, RICHARD H. MELCHERS, RICHARD C. MICHAELS and LOUIS NESSIM, being duly sworn, depose and say:

1. That we were members of the Board of Education of the Island Trees Union Free School District from September 19, 1975 to the present, the period covered by the affidavits of Richard J. Ahrens and Frank A. Martin accompanying this.

2. That we have each read each of the books reviewed by the committee referred to in the affidavits of Mr. Martin and Mr. Ahrens.

3. That we each thoroughly considered the recommendations of such committee, the opinions of the superintendent of schools and of members of the community before casting our respective votes with respect to these books (Exhibit "A-15").

4. That our reasons for casting votes to remove or restrict certain volumes was that they contained obsceneties, were irrelevant to our curriculum, were inappropriate and were in bad

taste. They contained foul language, gross sexual allusions and language that just wasn't necessary to the story line. Our votes were, however, split on certain works as a result of varying degrees of concern about the relevancy, educational applicability and degree of bad tasts (sic) exhibited.

5. That we feel we represented the basic values of the community in our actions and that we have exercised our duties in an intelligent, thoughtful and reasonable manner.

6. We have personal knowledge of the matters hereinabove referred to.

CHRISTINA FASULO
PATRICK J. HUGHES
RICHARD H. MELCHERS
RICHARD C. MICHAELS
LOUIS NESSIM

JURAT

EXHIBIT D

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
Docket No. 77C 217

DISTRICT COURT OF THE UNITED STATES
EASTERN DISTRICT: NEW YORK
(Title Omitted)

STATE OF NEW YORK
COUNTY OF NASSAU ss.:

WALF OGLESBY, being duly sworn, deposes and says:

1. That he is Superintendent of Schools of Island Trees Union Free School District and was Assistant Superintendent of Schools of Island Trees Union Free School District during the times referred to in the affidavits of Richard J. Ahrens and Frank A. Martin accompanying this.

2. That the teaching staff is not now nor has it been to my knowledge prohibited directly or indirectly from explaining or teaching about any of the "banned" books nor from discussing them or the ideas they express in any manner.

3. That I have caused an examination to be made of the residence addresses of the professional staff of the district and as a result thereof I find that only 5% of such staff reside within the district.

4. I have personal knowledge of the matters hereinabove referred to.

WALF OGLESBY

JURAT

EXHIBIT F

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Docket No. 77C 217

DISTRICT COURT OF THE UNITED STATES
EASTERN DISTRICT: NEW YORK
(Title Omitted)

STATE OF NEW YORK
COUNTY OF NASSAU ss.

RICHARD SEGERDAHL, being duly sworn, deposes and says:

1. That I am Principal of the M.F. Stokes School in the Island Trees Union Free School District and was a member of the book review committee referred to in the affidavits of Richard J. Ahrens and Frank A. Martin accompanying this.

2. That the said committee which was comprised of four parents and community members as well as four staff members of which I was one represented, in my opinion, a fair and representative cross section of the Island Trees community.

3. That each of the members of the committee to the best of my knowledge read each of the volumes reviewed and reported on and discussed them thoroughly at our committee meetings which numbered six or seven.

4. That the votes taken (and reflected in the final report of July 1, 1976 - exhibit "A-13") were the result of informed discussion and deliberation and reflect an honest effort of those involved to

determine relevancy, educational suitability, good taste and appropriateness.

5. I have personal knowledge of the matters hereinabove referred to.

RICHARD SEGERDAHL

JURAT

NOTICE OF MOTION TO CERTIFY AS CLASS ACTION
Civil Action No. 77 C 217 (GCP)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK
(Title Omitted)

PLEASE TAKE NOTICE that based upon the enclosed supporting memorandum and all other papers previously filed herein, plaintiffs will move this Court on Thursday, January 12, 1977, at 10:00 a.m., or as soon thereafter as counsel may be heard, in the United States Courthouse, 900 Ellison Avenue, Westbury, Long Island, for an order certifying this action as a class action pursuant to F.R.C.P. 23(b) (2).

Dated: November 17, 1977

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Attorney for Defendants

NOTICE OF MOTION
77 Civ. 217

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK
(Title Omitted)

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavits and upon all the proceedings heretofore had herein, the undersigned will move this Court pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the 2d day of February, 1978 at 2 p.m., or as soon thereafter as counsel may be heard, in the Courtroom of the Honorable George C. Pratt, United States District Judge in the United States Courthouse, Westbury, Long Island, for summary judgment herein on the grounds that no genuine issues exist as to any material fact and that the plaintiff is entitled to a judgment as a matter of law.

Dated: New York, New York
January 13, 1978

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ATTORNEY'S AFFIRMATION
77 Civ. 217

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK
(Title Omitted)

County of New York)
State of New York) ss.:

Alan H. Levine, under penalty of perjury, hereby affirms:

1. I am one of the attorneys for plaintiffs herein and submit this affirmation in support of plaintiffs' cross motion for summary judgment.

2. The facts and legal arguments in support of plaintiffs' motion are set out fully in the accompanying brief.

3. The pertinent documents are attached to the Complaint and to defendants' motion papers. In addition, attached to this affirmation are the Contents pages of one of the banned books, *A Reader for Writers.*

January 13, 1978

ALAN H. LEVINE

Rule 9g Statement

DISTRICT COURT OF THE UNITED STATES
EASTERN DISTRICT: NEW YORK
(Title Omitted)

Plaintiffs respectfully submit the following statement pursuant to Rule 9(g) of the General Rules of this Court describing the facts about which no material dispute exists:

1. All of the paragraphs listed in defendants' statement pursuant to local rule 9(g) except paragraphs 4, and 10 which if stated correctly should read as follows:

> 4. Such memo referred to *Slaughterhouse-Five, A Hero Ain't Nothing But A Sandwich, A Reader For Writers, Go Ask Alice, The Best Short Stories by Negro Writers, Black Boy, Laughing Boy, The Naked Ape,* and *Down These Mean Streets.* These nine books and two others, *Soul on Ice* and *The Fixer* were removed from the school libraries and curriculum pending further action by the Board.
>
> 10. On July 28, 1976, the Board formally resolved to remove nine of the eleven scrutinized books both from the library and use in the curriculum of the Island Trees Union Free School District, to restore one of the books on the basis of parental consent and to restore one of the books to the library and curriculum without any restriction.

2. At no time during the events relevant to this case did the defendants consult with or act upon the advice of literary experts, educational experts or academicians trained in the suitability of literature for high school and junior high school students. Defendants did not consult with librarians or teachers within the

Island Trees School System about the removal. Defendants did not read or evaluate the books in conjunction with reviews or rating services.

3. Defendants evaluation of the suitability of the books that were removed was based on the defendants' personal judgments about these books.

4. Defendants believe that their judgments with respect to the suitability of these books accurately reflected the judgments of a majority of parents in the Island Tree's Union Free School District.

5. On March 3, 1976, the defendants appointed a Book Review Committee of representative parents and staff to review the books in question. Defendants believed the Book Review Committee fairly represented their community. On July 1, 1976, that Committee voted to restore four of the books without restriction, restore one of the books with restriction requiring parental permission, and remove two of the books entirely. The Committee tied in their vote on two of the books without any action being taken. The defendants did not consult the committee or inquire or investigate the committee's decisions in any way. The defendants had available to them the results in the form of the committee's vote on each of the books at the time that the defendants made their decision to act upon the eleven books.

6. The defendants actions in reviewing the eleven books in question were initiated as the result of the attendance of three of the defendants at a conference of Parents of New York United (PONY-U) where excerpts from some of these books and titles of others, were listed along with many other books found objectionable by the PONY-U organization. Defendants did not undertake an independent review of other books in the district libraries and

reviewed only books listed by the PONY-U association.

7. Defendants actions to remove several of the books in question were based on their opinion that certain excerpts from the books were in and of themselves so objectionable that they rendered the entire book unacceptable for use in the district. Defendants found it necessary to remove some books based on objectionable excerpts even though defendants themselves believed that the entire book was not objectionable but for the excerpts.

8. Defendants removed some of the books based solely on the use of ungrammatical language. Defendants purpose in removing these books was to prevent the children in the district from being exposed to ungrammatical literary usage which defendants believed may have influenced the language usage of the students.

9. In other cases defendants removed books because they found excerpts to be offensive to religious, racial or ethnic groups even though defendants concede that in many instances the excerpts do not reflect the thematic point of view of the entire book to that racial, religious or ethnic group.

10. Defendants removed some of the books based upon excerpts they believed were offensive because they were sexually explicit and even though the defendants concede that none of the books as a whole are obscene.

11. Defendants removed some of the books because they viewed excerpts as anti-American and unpatriotic.

12. Defendants removed the books not only from the library but from the curriculum as a whole and forbade any teacher from using the books either as an assignment to a class or as optional

reading within a class project. Although the books themselves were excluded from use in the schools in any way, defendants have not precluded discussion about the themes of the books or the books themselves as long as the books were not used in that discussion.

13. *The Fixer* by Bernard Malamud had been used in several English classes in the Island Tree's high school for several years without any complaints or problems.

14. Defendants did not decide to ban the books on the basis of any complaints by either students or parents in the district.

Dated: New York, New York
January 13, 1978

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Rule 9g Statement

DISTRICT COURT OF THE UNITED STATES
EASTERN DISTRICT: NEW YORK
(Title Omitted)

Plaintiffs respectfully submit the following statement pursuant to Rule 9(g) of the General Rules of this Court describing the facts about which no material dispute exists:

1. All of the paragraphs listed in defendants' statement pursuant to local rule 9(g) except paragraphs 4 and 10 which if stated correctly should read as follows:

> 4. Such memo referred to *Slaughterhouse-Five, A Hero Ain't Nothing But A Sandwich, A Reader for Writers, Go Ask Alice, The Best Short Stories by Negro Writers, Black Boy, Laughing Boy, The Naked Ape,* and *Down These Mean Streets.* These nine books and two others, *Soul on Ice* and *The Fixer,* were removed from the school libraries and curriculum pending further action by the Board.
>
> 10. On July 28, 1976, the Board formally resolved to remove nine of the eleven scrutinized books both from the library and use in the curriculum of the Island Trees Union Free School District, to restore one of the books on the basis of parental consent and to restore one of the books to the library and curriculum without any restriction.

2. At no time during the events relevant this case did the defendants consult with or act upon the advice of literary experts, outside education experts or academicians trained in the suitability of literature for high school and junior high school students. Defendants did not consult with librarians or teachers within the

Island Trees School system about the removal of the books, although they did discuss the matter with the Superintendent of Schools. Defendants did not consult publications that rate books for junior and senior high school students.

3. Defendants Ahrens and Martin were responsible for initially removing the books from the district's libraries and for bringing the excerpts from the books to the attention of the other school board members. They are the only defendants who have given any recorded explanation for the removal.

4. Defendants' evaluation of the suitability of the books was based on the defendants' personal values, morals and tastes.

5. On March 3, 1976, the defendants appointed a Book Review Committee of representative parents and staff to review the books in question. Defendants believed the Book Review Committee fairly represented their community. On July 1, 1976, that committee voted to restore four of the books without restriction, restore one of the books with restriction requiring parental permission, and remove two of the books entirely. The Committee tied in their vote on two of the books without any action being taken. The defendants did not consult the committee or inquire about or investigate the committee's decisions in any way. The defendants had available to them the results in the form of the committee's vote on each of the books at the time that the defendants made their decision to act upon the eleven books.

6. The defendants actions in reviewing the eleven books in question were initiated as the result of the attendance of three of the defendants at a conference of Parents of New York United (PONY-U) where excerpts from some of these books and titles of others were listed along with many other books found objectionable by the PONY-U organization. Defendants did not undertake

an independent review of other books in the district libraries and reviewed only books listed by PONY-U. A then sitting member of the New York State Board of Regents was one of the speakers at the conference.

7. Defendants Ahrens and Martin sought removal of the books because they believed that certain excerpts from the books were in and of themselves so objectionable that they rendered the entire book unacceptable for use in the district.

8. Defendants Ahrens and Martin objected to those excerpts because some contained profanities, some were sexually explicit, some were ungrammatical, some were anti-American, and some were offensive to racial, religious or ethnic groups.

9. Defendants Ahrens and Martin objected to *A Reader for Writers* solely because it contained an essay by Jonathan Swift entitled "A Modest Proposal." Defendants considered the subject of that essay irrelevant to the curriculum.

10. Defendants removed the books not only from the library but from the curriculum as a whole. Their intent was to forbid any teacher from using the books as an assignment or suggesting them for optional reading. Although the books themselves were excluded from use in the schools in any way, defendants have not precluded discussion about the themes of the books or the books themselves. However, teachers may not suggest that the books be read in connection with such discussions.

11. *The Fixer* by Bernard Malamud had been used in several English classes in the Island Tree's high school for several years without any complaints from students or parents.

12. Defendants did not decide to ban the books on the basis of any complaints by either students or parents in the district.

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RULE 9g STATEMENT

DISTRICT COURT OF THE UNITED STATES
EASTERN DISTRICT: NEW YORK
(Title Omitted)

Defendants respectfully submit the following statement pursuant to Rule 9(g) of the General Rules of this Court describing the facts about which no material dispute exists:

1. All of the paragraphs listed in plaintiff's statement pursuant to local rule 9(g) except paragraphs 3, 4, 7, 8 & 9 which if stated correctly should read as follows:

> 3. Defendants Ahrens and Martin were responsible for bringing the excerpts from the books to the attention of the other school board members. The books were initially removed from the libraries at the board's unofficial direction given at a private session of the board on February 24, 1976 attended by the board, Superintendent and principals. A regular meeting of the board was held on that date. Defendants Ahrens and Martin are the only defendants who have given any recorded explanation for the removal. On March 3, 1976 defendant, Richard Ahrens, board president, issued a memorandum to the Superintendent reiterating the board's desire that the books in question be removed to the Board's office. Such action was ratified by unanimous vote of the board at its public meeting on March 30, 1976.
>
> 4. Defendants' evaluation of the suitability of the books was based on the defendants' personal values, morals, tastes and concepts of educational suitability.
>
> 7. In most instances defendants Martin and Ahrens

sought removal of the books because of excerpts varying in length from specific words to passages, chapters and, in one instance, an essay. In at least one instance the basic theme of the whole book was objected to. Other defendants may have had different reasons for their objections. Defendant Martin voted contrary to defendant Ahrens on two of the books in question.

8. Defendants Ahrens and Martin objected to the books for numerous reasons including the presence of profanities and obscenities, explicit sexual allusions, depictions of deviant sex, the glorification of sex and drugs, ungrammatical usage and excerpts offensive to racial, religious or ethnic groups. Different books were objected to for different reasons.

9. Defendants Ahrens and Martin objected to *A Reader for Writers* solely because it contained an essay by Jonathan Swift entitled "A Modest Proposal." Defendant Ahrens considered the subject of that essay irrelevant to the curriculum while defendant Martin felt it to be inappropriate.

2. The high school and junior high school maintained and operated by them contain libraries for the use of the students.

3. The books in said libraries are available for reading and for loan.

4. On March 3, 1976 Richard Ahrens, school board president, sent a memo to the Superintendent expressing "the Board's desire that all copies of the library books in question be removed from the libraries to the Board's office..."

5. Such memo referred to "Slaughterhouse-Five," "A Hero Ain't Nothing But a Sandwich", "Reader for Writers", "Go Ask

Alice", "The Best Short Stories by Negro Writers", "Black Boy", "Laughing Boy", "The Naked Ape" and "Down These Mean Streets."

6. Defendants Richard Ahrens, Frank Martin and Patrick Hughes had had these titles brought to their attention at a conference sponsored by Parents of New York - United.

7. Subsequent to such conference said books were found in the senior and junior high school libraries.

8. On March 30, 1976 the board appointed a committee to review the books in question and make recommendations thereon on the basis of their educational suitability, good taste, relevance and appropriateness to age and grade.

9. Such committee was comprised of four parents from the community and four staff members.

10. On July 1, 1976 said committee issued its formal report (aside from that recommending return of "The Fixer" to the curriculum on a restricted basis) recommending continued removal of some books, return of others on an unrestricted basis and of others on a restricted basis. The votes were mixed.

11. On 7/28/1976 the board formally resolved to restore some books on an unrestricted basis, to restore others on a restricted basis and to continue removal of others. The votes were mixed.

12. No teacher has been instructed not to discuss the books which were removed or to refrain from discussion or comment upon the ideas and positions they represent.

13. Obscenity of the volumes in question is not in issue.

March 14, 1978

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No. 80-2043

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Office-Supreme Court, U.S.
FILED
JUL 6 1981
ALEXANDER L. STEVAS,
CLERK

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT, NO. 26, et al.,

Petitioners,

—v.—

STEVEN A. PICO, by his next friend, FRANCES PICO, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUMMARY OF ARGUMENT

This case presents fundamental questions regarding the capacity of a school board to impose ideological and cultural orthodoxy through the control of school library materials. Nevertheless, certiorari review of the case should not be entertained, at this juncture, because the factual record underlying the instant dispute has not yet been fully developed.

Whether the petitioner school board's action, in removing nine books from the school libraries, constitutes the legitimate exercise of the board's authority or the unconstitutional suppression of unpopular ideas, depends on a careful evaluation of the factual context in which the board's action took place. Decisions of the various circuit courts that have reviewed high school book removal cases reveals

the importance that differing factual circumstances play in the resolution of such cases. Indeed, all the circuits that have reviewed such cases have recognized that, under some set of circumstances, the First Amendment might be offended by a decision to remove books from a school library. In this respect, there is no irreconcilable conflict among the circuits. The different results of the court of appeals decisions do not suggest a conflict of law, so much as they reinforce the view that school censorship cases involve delicate constitutional judgments which depend upon a careful assessment of the factual record.

With these considerations in mind the court of appeals remanded the instant case to the district court for a full development of the factual record. Where, as here,

important constitutional issues are at stake, sound and responsible adjudication can only profit from a full and fair exposition of the factual ingredients to the controversy. Under these circumstances, the policy of avoiding premature adjudication of constitutional issues counsels against the granting of the instant writ at this time.

REASONS WHY THE WRIT SHOULD BE DENIED

THIS COURT SHOULD NOT EXTEND ITS DISCRETIONARY REVIEW TO THIS CASE AT THIS TIME. THE POLICY OF AVOIDING PREMATURE ADJUDICATION OF CONSTITUTIONAL ISSUES COUNSELS AGAINST THE GRANTING OF THE INSTANT WRIT.

Although this case presents important First Amendment issues concerning the power of school boards to impose ideological and cultural orthodoxy through their control of library materials, we oppose the granting of certiorari at this time because the factual record underlying this controversy has not yet been fully developed.

This controversy involves the constitutionality of a decision by a local school board to remove eight books from a high school library and one book from a junior high school library.*/ The books were

*/ The book banned from the Island Trees School library was A Reader for Writers, edited by Jerome Archer. The eight books

(fn. cont. on next page)

physically removed and banned because they contained passages that members of the school board found "inconsistent with the basic values of the community that elected them." 474 F. Supp, 387, 397 (E.D.N.Y. 1979); (A-106).*/ Thus, at bottom, the clash between the school board

(fn. cont. from preceding page)
banned from the Island Trees High School library were Slaughterhouse Five, by Kurt Vonnegut, Jr.; The Naked Ape, by Desmond Morris; Down These Mean Streets, by Piri Thomas; Best Short Stories by Negro Writers, edited by Langston Hughes; Go Ask Alice, Anonymous; A Hero Aint Nothing But a Sandwich, by Alice Childress; Soul on Ice, by Eldridge Cleaver and The Fixer by Bernard Malamud. A ninth book to which access was restricted in the High School Library was Black Boy by Richard Wright.

*/ Parenthetical references preceded by "A", are to documents and pagination found in the Appendix to the instant Petition.

and the students in this case is a classic First Amendment confrontation between those who seek to deploy the force of majoritarian institutions to censor unpopular expression and those who seek to express--or to be exposed to--differing perspectives.

It is plain that traditional First Amendment "neutrality" principles prohibit the state from affording greater protection to the views of the majority than the views of the minority, See, e.g., Edwards v. South Carolina, 372 U.S. 229, 237 (1963), Police Dept. of the City of Chicago v. Mosley,408 U.S. 92 (1972). The present controversy is complicated, however, by the fact that it takes place in an institution--the public schools--that has, as one of its recognized goals, the transmittal and perpetuation of societal values. As stated in the opinion below: "the application of the prohibitions of the First Amendment to secondary school

education presents complexities not encountered in other areas of government activity." 638 F. 2d 404, 412 (1980); (A-18).

Nevertheless, while recognizing the historic inculcative function of public education, this Court has been careful to point out that the authority of the state and of school boards, in these respects, is not unlimited. At least two alternative doctrinal traditions suggest formidable First Amendment limitations upon the censorial authority of school boards. First, in a line of cases, ranging from Meyer v. Nebraska, 262 U.S. 390 (1923) and West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) and Keyishian v. Board of Regents, 385 U.S. 589 (1967) and Epperson v. Arkansas, 393 U.S. 97 (1968) to Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969), this Court has grappled with the tension between the

First Amendment's commitment to the heterogeneity of ideas and the existence of a public education system with responsibility to inculcate societal values. In resolving that tension, this Court has insisted that, whatever may be the inculcative authority of the state or of the local school boards, "the First Amendment...does not tolerate laws [or policies] that cast a pall of orthodoxy over the classroom." Keyishian v. Board of Regents, supra at 603.

This doctrinal tradition has forceful application to the instant controversy. Plaintiffs believe that after the facts of this case have been fully developed at trial, it will be apparent that the actions of the Island Trees school board grew out of a desire to impose an orthodoxy of values and beliefs.

There is also a second doctrinal tradition that is applicable to the case at

bar. That doctrine mandates that, "[p]recision of regulation must be the touchstone" where First Amendment interests are at stake. N.A.A.C.P. v. Button, 371 U.S. 415, 438 (1963). This Court has repeatedly observed that, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." Id. at 433. These concepts have given rise to a "First Amendment overbreadth" doctrine requiring that precise substantive criteria and regularized procedural mechanisms be employed by any governmental entity that seeks to censor expression. See Freedman v. Maryland 380 U.S. 51 (1965); Hamling v. United States, 418 U.S. 87 (1974). Writing for the Court below Judge Sifton noted "the erratic, arbitrary and free-wheeling manner in which the defendant school

officials proceeded in this case." 638 F. 2d at 416; (A-28). Again, after this case has been fully developed at trial the school board's violation of "First Amendment overbreadth" requirements will also be manifest.

At this procedural interval, however, no full factual development of this case has been undertaken. The case was submitted to the district court upon cross-motions for summary judgment. The district court granted judgment for the defendant school board by dismissing plaintiffs' complaint. The court of appeals reversed and remanded for trial. In so doing, the court noted the "unusual number of potentially conflicting values which compete for attention in matters relating to secondary education" and the First Amendment. 638 F. 2d at 413; (A-19).

Accordingly, Judge Sifton, writing the majority opinion, observed that in adjudicating issues involving the application of the First Amendment to school matters, it is important "to proceed with caution to consider not just the general outlines, but the specific facts of the case...." 638 F. 2d at 413; (A-20).

Judge Newman, concurring in the result, was even more explicit in requiring a fuller factual record:

> "A trial is required to determine precisely what happened, why it happened, and whether, in the circumstances of this case, the school board's actions, looking forward from the time they were taken, created a sufficient risk of suppressing ideas to constitute a violation of the First Amendment." */ 638 F. 2d at 438; (A-79-A-80).

*/ Facts, which might be developed and which would address the nature of the

(fn. cont. on next page)

Thus, the constitutional doctrines that inform the present controversy suggest that a delicate balance is at work here. While school officials can and do foster certain majoritarian values, what they cannot do is foster majoritarian values by eliminating

(fn. cont. from preceding page)
school board's oppressive and intimidating behavior, include the following:

(1) The firing of the Superintendent of schools for opposing the Board's book removal policy;

(2) The intimidation of librarians who opposed book removal;

(3) The methods the Board employed to marshal community support including a poll conducted by mail;

(4) The Board's formal and informal contacts with conservative organizations such as Parents of New York United, an affiliate of the Heritage Foundation;

(5) The views of Board members other than Ahrens and Martin whose testimony was exclusively relied on by defendants;

(6) The proceedings at Board meetings at which the issue of book removal was discussed;

(7) The circumstances surrounding the Board's rejection of the recommendation of the Book Review Committee which urged retention of several of the books; and

(8) The proposed methods of disciplining teachers and students who violated the book ban.

conflicting values. To do that is to impose a "pall of orthodoxy." And the precise contours and texture of such a pall can only be discerned upon a full evidentiary record. Similarly, the First Amendment requirements of procedural regularity and specificity may vary with the factual circumstances.

These considerations suggest that it would be premature for the Court to grant certiorari to the instant case in its present posture. A trial of the instant dispute is necessary to fully develop the factual record in this case. And only after the facts have been fully developed would the courts be in a position to fully and fairly adjudicate the delicate constitutional questions presented. For this reason respondents urge that the Court deny the instant petition.*/

*/ An examination of the decisions of the various circuit courts that have entertained

(fn. cont. on next page)

The policy of avoiding the premature adjudication of constitutional issues has a deep and venerable tradition in this Court. Rescue Army v. Municipal Court, 331 U.S.

(fn. cont. from preceding page)
high school book-banning cases reveals the importance that differing factual circumstances play in the resolution of such cases. All the circuits that have reviewed such cases have recognized that, under some set of circumstances, the First Amendment might be offended by a decision to remove books from a school library. In this respect, there is no irreconcilable conflict among the circuits. The different results of the Court of Appeals decisions have turned upon differing factual contexts in which each of the book-banning decisions has taken place. Compare Minarcini v. Strongsville City School District, 541 F. 2d 577 (6th Cir. 1976) and Pico v. Board of Education, 638 F. 2d 404 (2nd Cir. 1980) with Cary v. Board of Education, 598 F. 2d 535, 544 (10th Cir. 1979) and Zykan v. Warsaw Community School Corp., 631 F. 2d 1300, 1305-1306 (7th Cir. 1980). Thus the different outcomes within the circuits do not suggest a conflict of law so much as they reinforce the view that school censorship cases, such as that at bar, involve delicate constitutional judgments which depend upon a careful assessment of a full and complete factual record.

549 (1947); Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Company, 389 U.S. 327 (1967); Parker v. County of Los Angeles, 338 U.S. 327 (1949); Cowgill v. California, 396 U.S. 371 (1970). Indeed, out of deference to that tradition the Court quite recently vacated a grant of certiorari review and dismissed the writ in Minnick v. California Department of Corrections, ___U.S.___, 49 U.S.L.W. 4609 (June 1, 1981).

As in the case at bar, Minnick involved difficult and controversial constitutional questions and important issues of social policy.*/ As in the case at bar, resolution of the constitutional questions posed by Minnick involved careful sifting of the factual record. As in the case at bar, this

*/ Minnick involved a "reverse discrimination" suit challenging the constitutionality of California's affirmative action program for correctional officers.

Court had been asked to entertain certiorari review of the controversy before all of the facts were fully examined at trial. Accordingly, in Minnick this Court dismissed its original writ of certiorari as improvidently granted. Writing for the Court, Justice Stevens suggested that further proceedings in the trial court might ultimately reduce 'the underlying constitutional issues [to] clean-cut and concrete form.' Id. at 4614.

The policy considerations underlying the Minnick decision are sound. One set of considerations involves a recognition of "the unique place and character, in our scheme [posed by the Court's capacity to engage in] judicial review of governmental action for constitutionality." Rescue Army v. Municipal Court, supra at 571. See also Justice Brandeis' opinion (dissenting in part) in Ashwander v. Tennessee Valley Authority.

297 U.S. 288, 341 (1936) and Bickel, The Least Dangerous Branch (1962).

A second set of considerations involves the quite obvious proposition that sound judicial decisionmaking is enhanced by evaluating legal principles in the context of concrete and specific factual situations. See, e.g. Watson v. Buck, 313 U.S. 387, 402 (1941).

Where, as here, important constitutional issues are at stake, sound and responsible constitutional adjudication can only profit from a full and fair exposition of the factual ingredients to the controversy. Without a trial, it would be premature for this Court to entertain now the important issues raised by this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari in the above-styled matter, should be denied.

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July 1, 1981

MOTION FILED

CASE NO. 80-2043

JUL 7 1981

IN THE

Supreme Court of the United States

October Term, 1980

BOARD OF EDUCATION,
ISLAND TREES UNION FREE
SCHOOL DISTRICT NO. 26, ET AL.

Petitioners

vs.

STEVEN A. PICO, ET AL.

Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF OF AMICUS CURIAE BY CHARLES H KEATING, JR., AND CITIZENS FOR DECENCY THROUGH LAW, INC., AND BRIEF IN SUPPORT OF THE PETITIONERS FOR WRIT OF CERTIORARI

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CASE NO. 80-2043

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1980

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26; RICHARD AHRENS, FRANK MARTIN, CHRISTINA FASULO, PATRICK HUGHES, RICHARD MELCHERS, RICHARD MICHAELS, AND LOUIS NESSIM.

Petitioners

vs.

STEVEN A. PICO, by his next friend, FRANCES PICO; JACQUELINE GOLD, by her next friend, RONA GOLD; RUSSELL RIEGER, by his next friend, SAMUEL RIEGER; GLENN YARRIS, by his next friend, RICHARD YARRIS; and PAUL SOCHINSKI, by his next friend, HENRY SOCHINSKI.

Respondents

MOTION FOR LEAVE TO FILE A BRIEF OF AMICUS CURIAE BY CHARLES H KEATING, JR. AND CITIZENS FOR DECENCY THROUGH LAW, INC., AND BRIEF IN SUPPORT OF THE PETITIONERS FOR WRIT OF CERTIORARI

Charles H Keating, Jr., and Citizens for Decency through Law, Inc., the Moving Parties herein, respectfully move this Honorable United States Supreme Court, pursuant to Court Rule

36, for leave to file a brief as Amicus Curiae in support of the Petitioners, on or before the 3rd day of June of 1981.

Moving Parties have a special and fervent interest in the subject matter of this appeal, having devoted considerable time, study, and effort to assisting federal and state law enforcement authorities over the past twenty years in the enforcement of law regulating and combating the commercial exploitation of obscene materials within this country. Charles Keating is the founder and co-counsel for Citizens for Decency through Law, Inc., formerly Citizens for Decent Literature, Inc., an Ohio corporation with over one hundred thousand contributors and supporters and with chapter affiliates throughout the United States. Citizens for Decency through Law, Inc. (CDL), is a non-profit, non-sectarian, and

non-political organization with its national headquarters formerly located in Cleveland, Ohio, now located at 2331 W. Royal Palm Road, Phoenix, Arizona, formed for and dedicated to the support of effective and rational obscenity laws and the efforts of governing legislative bodies in the passage of obscenity legislation through public education, the dissemination of existing and proposed obscenity laws, and lending legal assitance to prosecutors and law enforcement personnel.

Moving Party was also a member of the Presidential Commission on Obscenity and Pornography. Responding to the opening statement of Public Law 90-100, "The Congress finds that the traffic in obscenity and pornography is a matter of national concern.", Moving Party authored and released his findings in the "Report of Charles H Keating, Jr.,

Commissioner", which explained the workings of the Commission and the wealth of statistical information and human experiences which prove the relationship between the purveyance of obscenity to crimes and other anti-social behavior. (Report released September 30, 1970.)

That Moving Party's personal efforts, and those of CDL, are shared on a national level is evidenced by the membership of one hundred forty-six past and present members of Congress and state governors, as well as respected and dedicated clergy, educators, prosecutors, media personnel, and corporate officers, who join in the function and goals of CDL and Mr. Keating.

The extent of Moving Party's involvement in the actual enforcement of obscenity laws is evidenced by his

having been plaintiff on behalf of the State of Ohio in an obscenity nuisance abatement action which was affirmed by the Supreme Court of Ohio, State of Ohio, ex rel Charles H Keating, Jr. v. A Motion Picture Film Entitled "Vixen", et al., 27 Ohio St.2d 278, 272 N.E.2d 137 (1971), affirmed on remand from this Court, 35 Ohio St.2d 215, 301 N.E.2d 880 (Sept. 26, 1973).

Moving Party and CDL have also filed briefs amicus curiae in this Court urging that obscenity laws or convictions be upheld: Jacobellis v. Ohio, 378 U.S. 184, 12 L.Ed.2d 793, 1333 (1964); Memoirs v. Massachusetts, 383 U.S. 413, 16 L.Ed.2d 1, 1052 (1966); Ginzburg v. United States, 383 U.S. 463, 16 L.Ed.2d 31, 1079 (1966); Mishkin v. New York, 383 U.S. 502, 16 L.Ed.2d 56, 1082 (1966); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 37 L.Ed.2d 447,

1110 (1973); Heller v. New York, 413, U.S. 483, 37 L.Ed.2d 745, 1225 (1973); Jenkins v. Georgia, 418 U.S. 153, 41 L.Ed.2d 642, 1295 (1974); Marks v. United States, 430 U.S. 188, 51 L.Ed.2d 260 (1977); Splawn v. California, 431 U.S. 595, 52 L.Ed.2d 606, 883 (1977); and Vance v. Universal Amusement Co., 445 U.S. 308, 63 L.Ed.2d 413 (1980).

Furthermore and most recently, this attorney represented the Respondents, State of Ohio, in the case of Flynt v. Ohio, No. 80-420, decided May 18, 1981.

Moving Party hopes to urge as amicus curiae that although the Respondents herein had, in their status as students in the Island Trees Union Free School District No. 26, a protectable First Amendment entitlement, that entitlement was subject to and limited by the reasonable exercise of certain statutory directives by the

Petitioners, and furthermore, because of the limited nature of Respondents entitlement it was not subject to scrutiny under the Due Process Clause of the Fourteenth Amendment.

It is sincerely hoped that this Court will grant our Motion for Leave to File Brief as Amicus Curiae and allow us to participate in this cornerstone case which presents important issues for all the people of the United States as well as those of the State of New York.

Respectfully submitted,

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CASE NO. 80-2043

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1980

BOARD OF EDUCATION,
ISLAND TREES UNION FREE
SCHOOL DISTRICT NO. 26, ET AL.

Petitioners

vs.

STEVEN A. PICO, ET AL.

Respondents

BRIEF OF AMICUS CURIAE
IN SUPPORT OF PETITIONERS

LAW AND ARGUMENT

Proposition of Law No. 1
DO RESPONDENTS, IN THEIR STATUS AS STUDENTS IN THE ISLAND TREES SCHOOL DISTRICT NO. 26, HAVE A FIRST AMENDMENT RIGHT GREATER THAN THAT RIGHT GIVEN THE PETITIONERS TO MANAGE AND CONTROL SAID UNION FREE SCHOOL.

Although the Respondents in their status as citizens have the same qualified First Amendment protection as that granted to both the sources of a communication and their recipients, [Va.

St. Bd. of Pharmacy v. Va. Cit. Cons. Council, 425 U.S. 748 (1976)], Respondents in their status as students have something less than that granted to other citizens. In Tinker v. Des Moines School District, 393 U.S. 503 (1969), this Court stated (at 506), "[F]irst Amendment rights applied in the light of the special characteristics of the school environment, are available to teachers and students".

Some of the "special characteristics" found in a "school environment", which are usually not present outside that environment, include the ability of the state "to transmit the basic values of the community", James v. Board of Education, 461 F.2d 566, 573 (2d Cir.), cert. denied 409 U.S. 1042 (1972), and the ability of the school to fulfill its

"responsibility to promote standards of decency and civility among school children". Thomas v. Board of Education, 607 F.2d 105, 113 (1977).

Professor Laurence H. Tribe in his treatise on American Constitutional Law acknowledges the "special characteristics of the school environment" when he states:

> [P]ublic facilities like schools and libraries, created not primarily for public interchange but for purposes closely linked to expression have been treated as 'semi-public forums', with government enjoying power to preserve such tranquility as the facilities' central purpose requires - a power that would be denied in a true public forum - but no power to exclude peaceful speech or assembly compatible with that constitutional law. (Tribe, American Constitutional Law p. 690, (1978). (Emphasis added.)

Acknowledging that First Amendment rights do not stop at the "schoolhouse gate", Healy v. James, 408 U.S. 169, 180

(1971), quoting Tinker, supra, but recognizing that because of the nature of a school, its "semi-public" purpose, and its "special characteristics" that allows governments to "preserve such tranquility as the facilities' central purpose requires", Amici contends that the Respondents' First Amendment protection while on the school grounds is not only qualified but is subject to and limited by the reasonable regulations of the local school board.

The Petitioners', pursuant to Section 1709, and subdivision 1 of section 701 of the New York Education Law, were given a statutory duty to: (1) describe the course of study; (2) prescribe the textbooks; (3) take charge and possession of the books; and (4) manage and control the schools.

To fulfill this statutory mandate

and to carry out their ". . . responsibility to promote standards of decency and civility among school children", (Thomas, supra), Petitioners removed certain reading materials, which they believed to be objectionable, and which they believed to be contrary to the "central purpose" of the school, from the library shelves.

In accomplishing this, the Petitioners did not prohibit discussion of the removed materials in or outside the classroom, nor did they prohibit the private possession of the materials by the teachers or students. All the Petitioners did was prohibit the accessibility of the materials in the school library. This was clearly a reasonable exercise of the Petitioners duty imposed upon them by statute and common law.

Furthermore, as this reasonable exercise of power by the Petitioners is compared with the qualified and limited First Amendment privilege enjoyed by the Respondents, in their status as students, it is clear that the exercise of the one was not an overburden on the enjoyment of the other.

Proposition of Law No. 2
DID RESPONDENTS IN THEIR STATUS AS STUDENTS HAVE A SUFFICIENT FIRST AMENDMENT ENTITLEMENT DEMANDING PROTECTION BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The requirements of procedural due process apply only to deprivation of interests encompassed within the Fourteenth Amendment's protection of liberty and property, [Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972)], and one of the many "liberty" rights encompassed within the Fourteenth Amendment includes the freedom of

expression, Gitlow v. New York, 268 U.S. 652 (1952).

Therefore, subject to the limitations and qualifications in Amici's first argument, it is granted that Respondents have a limited entitlement protectable under certain circumstances by the Fourteenth Amendment.

However, because of these limitations and qualifications, Respondents did not have a "liberty" interest sufficient to require the School Board to grant them a hearing when they decided to remove the books, and therefore, any "liberty" deprivation suffered by the Respondents was only "de minimis" and not protected.

The deprivation was "de minimis" because of the nature of the limited interest itself and also as this Court

said regarding the respondent in Roth, supra, at page 567, "It stretches the concept too far to suggest that a person is deprived of "liberty" when he simply is not rehired in one job but remains free as before to seek another". The Respondents here remained free, as before, to seek another book in possibly a public library or, at least, by purchase from a private book dealer.

The "nature" of Respondents' entitlement was presented in the Amici's first argument, and as this Court stated, ". . . in determining whether due process requirements apply in the first place we must look not to the 'weight' but to the nature of the interest at stake". Goss v. Lopez, 419 U.S. 565, 569 (1975), citing Roth, supra, at 570-571 (Emphasis added). In examining again the "nature of the

interest at stake", it has been clearly demonstrated that the Respondents were not, in this instance, entitled to due process protection.

However, even though the Respondents were not entitled to due process protection, the Petitioners on their own did allow imput from a committee established by them to assist them in their decision. Though the Petitioners later disregarded many of the recommendations of the committee is immaterial because: (1) they did not have to provide any procedure to begin with; and (2) they were under no mandate (nor could they have been) to accept the recommendations of the committee.

Therefore, even assuming that this Court determines that some process was due, the procedures established by the Petitioners were sufficient to protect

the limited rights of the Respondents and were ". . . appropriate to the nature of the case". Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950).

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

CHARLES H KEATING, JR.
CITIZENS FOR DECENCY
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CERTICIATE OF SERVICE

Three copies of the foregoing Motion for Leave to File a Brief of Amicus Curiae by Charles H Keating, Jr., and Citizens for Decency through Law, Inc., and Brief in Support of the Petitioners for Writ of Certiorari were mailed this 2nd day of July of 1981 to the following:

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MOTION FILED
JUN 29 1981

IN THE

Supreme Court of the United States

October Term, 1981

Docket No. *80-2043*

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26; RICHARD AHRENS, FRANK MARTIN, CHRISTINA FASULO, PATRICK HUGHES, RICHARD MELCHERS, RICHARD MICHAELS, AND LOUIS NESSIM,

Petitioners,

— against —

STEVEN A. PICO, by his next friend, FRANCES PICO; JACQUELINE GOLD; RUSSELL RIEGER, by his next friend, SAMUEL RIEGER; GLENN YARRIS, by his next friend, RICHARD YARRIS and PAUL SOCHINSKI, by his next friend, HENRY SOCHINSKI.

Respondents.

MOTION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*

and

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

by

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IN THE

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Docket No. *80-2043*

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26; RICHARD AHRENS, FRANK MARTIN, CHRISTINA FASULO, PATRICK HUGHES, RICHARD MELCHERS, RICHARD MICHAELS, AND LOUIS NESSIM,

Petitioners,

— against —

STEVEN A. PICO, by his next friend, FRANCES PICO; JACQUELINE GOLD; RUSSELL RIEGER, by his next friend, SAMUEL RIEGER; GLENN YARRIS, by his next friend, RICHARD YARRIS and PAUL SOCHINSKI, by his next friend, HENRY SOCHINSKI.

Respondents.

MOTION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*

In accordance with Rule 36 of the Supreme Court of the United States, the National Association of Secondary School Principals, by its attorney, respectfully petitions the Court for leave to file a brief, *amicus curiae*, in the above titled action. The grounds for this petition are as follows.

This dispute involves important legal issues affecting public education in the United States. First, the case squarely presents the question of the degree to which the First Amendment rights of students may justify interference with the legitimate authority of local school boards and their designated administrative staff to carry out their responsibilities. Second, the case involves the important question of whether, and to what degree, our public schools are to be permitted to serve the

function of transmitting values supported by the majority of the citizens of the local community.

Petitioners consented to the filing of a brief, *amicus curiae*, but advise us that such consent would not be given by the respondents, therefore necessitating this motion.

I INTERESTS OF PETITIONER GENERALLY

The National Association of Secondary School Principals (NASSP) is a voluntary association of approximately 35,000 administrators of public and private secondary schools throughout the United States. NASSP was organized in 1916 to provide a spokesman for secondary school administrators in the formulation of all aspects of educational policy in the United States and to improve programs for students enrolled in these schools. Although NASSP customarily does not seek to intervene in private litigation, it believes that this case involves issues of such fundamental public importance as to make an expression of its views essential.

The NASSP is committed to the improvement and strengthening of secondary education. It seeks to be responsive to changes both in school environment and in the role of education in society. It promotes research and development in curriculum standards and course content. It seeks to develop higher standards and qualifications for secondary school administration through professional intern and improvement programs. It seeks to focus attention on national educational problems by providing leadership services to its members and information to the general public. NASSP is organized exclusively for educational and charitable purposes.

In the course of its professional activities, the NASSP believes that it has acquired substantial background and knowledge which may not be adequately provided by the parties to this case. Petitioners believe that such background knowledge and information is essential for a fair and expeditious consideration of the issues of this case, and that it represents a perspective and point of view which corresponds with the public interest.

II SPECIFIC INTEREST OF PETITIONER IN THIS CASE

The NASSP does not deny—indeed, it strongly affirms—the proposition that secondary school students, like all other American citizens, have basic rights under the United States Constitution. It is equally our belief, however, that those rights, again like those of all other Americans, are not without limits.

The NASSP further believes that failure to recognize such limitations upon student rights as may be necessary to assure the proper and efficient conduct of public education can only result in a loss of faith in, and withdrawal from the schools, of the public support and confidence upon which they depend.

If respondents prevail in the present case, we believe that these dire effects may well be enhanced. And if these issues are not addressed and resolved at the highest level of our judicial system, the resulting confusion and uncertainty can only produce similar results by encouraging further attempts to challenge school board authority throughout the country.

The NASSP is aware that many special interest groups are involved in a carefully planned and coordinated effort to change the fundamental nature of public education in the United States through the use of constitutional arguments in the courts. The NASSP believes that these constitutional questions can be adequately considered only if the Court has before it information regarding the problems of professional school administration and public education which surround and give substance to those questions of law. It believes that such information and background may not be fully provided by the parties.

III NO ADDITIONAL BURDENS WILL BE PLACED UPON THE COURT OR THE PARTIES

If this motion is granted, there will be no added burdens placed upon the Court, and the parties will in no way be

prejudiced. The NASSP does not seek to delay the proceedings, nor to take the time of the Court or of petitioners for oral argument. It merely seeks leave to submit a brief regarding questions of law affecting the issues before the Court. In so doing, it will, of course, fully comply with the rules of the Court and any other requirements which the Court may impose in order to prevent delay or prejudice to the interests of the parties.

It is therefore respectfully urged that certiorari and this motion be granted, and that the brief of the National Association of Secondary School Principals as *amicus curiae* be accepted by the Supreme Court of the United States.

Respectfully submitted,

Ivan B. Gluckman
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National Association of
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June 22, 1981

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Amicus curiae, the National Association of Secondary School Principals (NASSP) is a voluntary association of approximately 35,000 administrators of public and private secondary schools throughout the United States. NASSP was organized in 1916 to provide a spokesman for secondary school administrators in the formulation of all aspects of educational policy in the United States and to improve programs for students enrolled in these schools. Although NASSP customarily does not intervene in private litigation, it believes that this case involves issues of such fundamental public importance as to make essential an expression of its views. A more complete statement of NASSP's interest in this case, together with a description of the background and activities of NASSP, are included in NASSP's Motion for leave to file this brief as *amicus curiae*.

SUMMARY OF FACTS

Few of the facts of this case are in dispute. Following attendance at a meeting sponsored by an admittedly conservative group concerned about public education, several members of the defendant Board of Education recommended review of the Senior High School Library to see whether some of the books which had been brought to their attention as objectionable were represented there. Upon finding that they were, a review process was established in which a Committee was established made up of members of the high school staff and of the community at large. This Committee examined the books involved, and made recommendations to the Board. The Board in turn reviewed the Committee's recommendations, followed some, and refused others.

Ultimately, after having read all of the books involved, the Board ordered that a number of the books be removed from the library, and others to be made available only on a restricted basis. The reasons for these actions and the objections which led up to them are not as easy to characterize in a manner agreeable to both parties. Petitioner Board members claim that their primary objections were to vulgarity, obscenity, religious slurs, and general bad taste. The respondents claim that the real motives were political and social disagreement with the positions espoused by the authors.

The Board members further contend that their motives are to preserve and support the prevailing moral and ethical values of the community through its public schools. The respondents imply that it is rather the desire of the Board to indoctrinate students with the Board members' own views.

It is these issues which would have to be determined by the federal district court if the case is remanded pursuant to the Second Circuit's order.

ARGUMENT
I

Petitioners have both the legal authority and the responsibility to remove books from its libraries for adequate substantive reasons.

No one contests that the Island Trees School Board has the authority and responsibility to establish and control the educational program in the schools of the district.

This is the clear intent and purpose of the Legislature as stated in Section 1709 of the Education Law of the State of New York. Among the specific powers and duties prescribed are: establishment of the course of study, selection of the textbooks to be used, and control of "the books, apparatus, and all school property within its district." (Subsection 9). The Board is further granted:

> ". . . the superintendence, management and control of said union free schools . . ." (Subsection 13) and,

"the superintendence, management and control of the educational affairs of the district, and therefore shall have all the powers reasonably necessary to exercise powers granted expressly or by implication by this chapter or other statutes." (Section 33).

There can be no doubt from the quoted language of the statute that it was the Legislature's clear intent that the local School Board have full control of the educational process within the publicly supported schools of its district. The courts and the state Commissioner of Education have so held on innumerable occasions.*

A. The school library and its contents are a fundamental part of the school's educational program, subject to the control of the Board.

This assertion would seem almost self-evident, but in any event should be accepted by both parties to this suit inasmuch as it was accepted as true even by the Sixth Circuit in *Minarcini v. Strongsville City School District*, 541 F2d 577 (6th Circuit) 1972, upon which respondents have placed major reliance.

B. If the School Board has the authority to select books for its libraries, it must have the equal power to remove them for good reason.

This assertion would also seem, at first glance, to be self-evident, but it was on this point that the Sixth Circuit disagreed. Apparently, in a misplaced reliance upon the so-called "public forum" theory, the court held that once the Board had allowed a book to be placed in the school library, it could not be removed for any substantive reason, or at least for any reason which might be based upon any social or political beliefs of the Board members. But no cases can be cited in which the mere

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*See, for example, *Matter of Serverski*, 7th Ed. Dept. Rep. 79 (1967) upholding board's discretion in re specific courses of instruction; *Matter of White*, 33 St. Dept. Rep. 229 (1925) sustaining board decision to abolish a high school, and particularly *Matter of Kornblum*, 70 St. Dept. Rep. 19 (1949) in which the Commissioner of Education upheld the board's authority to discontinue subscription to a periodical.

purchase of materials by a school or other institution has been considered to be the establishment of a public forum.

In every case prior to *Minarcini* in which this doctrine has been applied, the issue has involved the right of plaintiffs to *express themselves*, either orally or in writing. *Pliscou v. Holtville Unified School District*, 411 F. Supp. 842 (S.D. Calif.) 1976; *Trujillo v. Love*, 322 F. Supp. 1266 (D. Colo.) 1971. It is our belief that the application of such a doctrine to the mere purchase of a book for the school library is so great a change from the original intent as to distort it beyond recognition. Were it to be accepted, it would be difficult for boards even to change textbooks, unless such changes could be in some way justified to any complainant. And what of course offerings? Would the elimination of a French class require proof that the Board had no anti-Gallic motive? In short, to apply this doctrine in the case at bar is to reverse the burden of proof, requiring the school district in every case to prove absence of improper motive if it would make any change in the educational program of the school. Clearly, this has never been contemplated by either the legislature or the courts.

C. Removal of books by the Board from school libraries under its control infringes no constitutional right of student respondents.

Respondents have argued that petitioners' actions in removing certain books from the school library have interfered with their constitutional rights under the First Amendment to the United States Constitution. But no such right has been evidenced. Certainly, a right to freedom of speech, even within school classrooms has been recognized for students. *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969). And it can be admitted that the bounds of freedom of expression have been considerably expanded in recent years. But all of the cases cited by respondents in support of their current argument seem clearly distinguishable. Except for *Minarcini* and its progeny, none involved schools or student rights, and all involved situations in which the information sought by plaintiffs was unavailable from any other source. (*Procunier v. Martinez*, 416 U.S. 396 [1974], and *Virginia State Board of*

Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 [1976].) Nevertheless, in *Minarcini*, and the decisions which have followed it, the fact that the publications involved were available to students elsewhere than the school library was not regarded as relevant.

As so well stated by the Second Circuit in *President's Council, District 25 v. Community School Board No. 25*, 457 F. 2d 289 (1972):

> "To suggest that the shelving or unshelving of books presents a constitutional issue, particularly where there is no showing of a curtailment of freedom of speech or thought, is a proposition we cannot accept."

Even if the broadest interpretations are placed upon the concept of free expression, it is time for the courts to recognize that the dimensions of the "marketplace of ideas" protected by the Constitution must vary when applied to minor children of different ages, and a proper distinction recognized between activities occurring within schools and without. The Seventh Circuit recognized this necessity in its recent decision in *Zykan v. Warsaw Community School Corporation*, 631 F2d 1300 (1980). After agreeing that:

> "Secondary school students certainly retain an interest in some freedom of the classroom, if only through the qualified 'freedom to hear' that has lately emerged as a constitutional concept; see *Virginia Pharmacy Board v. Virginia Citizens Consumers Council*, 425 U.S. 748,"

the court stated:

> "But two factors tend to limit the relevance of 'academic freedom' at the secondary school level. First, the student's right to and need for such freedom is bounded by the level of his or her intellectual development. A high school student's lack of the intellectual skills necessary for taking full advantage of the marketplace of ideas engenders a correspondingly greater need for direction and guidance from those better equipped by experience and reflection to make critical educational choices. Second, the importance of secondary schools in the development of intellectual faculties is only one part of a broad formative

role encompassing the encouragement and nurturing of those fundamental social, political, and moral values that will permit a student to take his place in the community." (631 F. 2d 1300, 1304.)

II

Local school boards have both the authority and the legal obligation to establish and enforce some minimum standards of morality in the public schools under their jurisdiction.

We believe that the arguments offered above offer more than sufficient justification for reversing the majority decision of the Court of Appeals, and for sustaining the authority of the school board in its proper exercise of control of the contents of the school library.

We would additionally offer one more argument, however, because we believe that it underlies all of the issues involved in this case, and because of its importance to the members of the *amicus* NASSP. Recently, educational journals have been full of discussions of the appropriate place of values education in the public school. One report, for example, entitled "Values Education," ERS Information Aid, Educational Research Service, Arlington, Virginia, (1976) lists 225 entries in a "selected bibliography" of educational articles on this subject. Also in 1976, in a national conference co-sponsored by the U.S. Department of HEW and our own Association, values education was regarded as a major topic. (See "Values Education" Back to a Basic," in *New Dimensions for Educating Youth: A Report of America's Secondary Schools*, U.S. Government Printing Office; 1976.)

While there is much room for argument about the administrative aspects of the subject, there seems little question that every possible legal source of authority *requires* that at least some minimum moral standard be established and maintained by the board or other governing body of public school districts.

In Massachusetts, for example, when the very first public schools in our country were established, the preamble to the Constitution of the Commonwealth included this statement concerning the purpose of the public schools:

"Wisdom and knowledge, *as well as virtue* . . . being necessary for the preservation of their [the people's] rights and liberties . . . it shall be the duty of legislatures to cherish the interests of literature and the sciences . . . to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings, sincerity, good humor, and all social affectations [and] generous sentiments among the people" (Emphasis added.) Massachusetts Constitution, Chapter 5, Section 2."

The state's statutes are even more precise, mandating that "full and satisfactory evidence of their moral character" be required of those associating with children and youth in our schools. They further charge instructors to impress on the minds of these same children and youth the:

". . . principles of piety and justice, and a sacred regard for truth, love of their country, humanity, and universal benevolence, sobriety, industry and frugality, chastity, moderation and temperance, and those other *virtues which are the ornament of human society* and the basis upon which a republican constitution is founded. . . ." (Chapter 71, Sec. 30. Mass. General Statutes.) (Emphasis added.)

These constitutional and statutory mandates derive from the very nature of the public school system, a system established for the public purpose of preparing all children to participate in, and assume the burdens of citizenship. As one authority states:

"The state finds its right to tax for the maintenance of a system of public schools in its duty to promote the public welfare, the good order and peace of society. The primary function of the public school, in legal theory at least, is not to confer benefits upon the individual as such. The school exists as a state institution because the very existence of civil society demands it." *The Courts and the Public Schools*, by Newton Edwards, 3rd Ed., pp 23–24 op. cit. See also *Bissell v. Davison*, 65 Conn. 183; *Scown v. Czar-*

necki, 264 Ill. 305; *Fogg v. Bd. of Ed.*, 76 N.H. 296.

These broad assumptions, though long accepted in our society, require reaffirmation as they are sometimes forgotten in the desire to achieve other objectives. This seems to be the situation in the present case. If public schools are to serve public purposes, they must be administered in a manner that is responsive to the public which they serve and upon which these schools depend for their very existence. One of the expectations of that public, we would urge, is the establishment and maintenance of standards—both moral and intellectual—satisfactory to the state and the local community.

There can be little question of what the general public wants. In the 8th Annual Gallup Poll of the Public's Attitude Toward the Public Schools, respondents were asked which of the qualities most important in the overall development of children were most neglected by parents today. They picked "high moral standards." And when asked which was most neglected by schools today, they again picked "high moral standards" most often.

Regarding "moral development" in another question, nearly seven out of ten parents of children in public schools said they want the schools to share with them in the responsibility for the moral behavior of their children. (*Phi Delta Kappan* Magazine, October 1976.)

In a speech made shortly before leaving office in 1975, then U.S. Commissioner of Education, Terrel Bell, now Secretary of the Department of Education, observed that parents "have a right to expect that the schools . . . will support the values and standards that their children are taught at home. And if the schools cannot support those values they must at least avoid deliberate destruction of them."

It is the job of the school board, selected by the local community and empowered by the state legislature to decide just what standards meet the expectations of the local community. If its members fail to do so, they are subject to removal by orderly governmental process. All of this is so basic, so fundamental, so elementary to an understanding of American education that we hesitate to discuss it here. Unfortunately, it seems

necessary because of legal challenges like that now before this Court.

In the guise of a constitutional First Amendment right the respondents have sought to substitute their judgment of what is appropriate, for that of the duly selected local school board. In so doing, respondents reach some truly paradoxical results—that books selected and placed in a school library by a librarian or teacher employed by the school board cannot be removed by that board itself; that books which the board seeks to remove can only be removed for non-substantive reasons, presumably that they are damaged, worn-out, or, possibly, out of date.

Certainly, this cannot be the intent of the law.

In the *Zykan* opinion, cited previously, the Seventh Circuit makes the appropriate legal principle crystal clear. Speaking of the scope of the power vested in local school boards, the court states:

> "This grant of broad discretion specifically means that there are only limited constitutional constraints on the form and content of decisions of local school boards acting within the bounds of their statutory powers. Educational decisions necessarily involve choices regarding what students should read and hear, and particularly in light of the formative purpose of secondary school education, local discretion thus means the freedom to form an opinion regarding the instructional content that will best transmit the basic values of the community. As a result, it is in general permissible and appropriate for local boards to make educational decisions based upon their personal, social, political, and moral views. *Cary v. Board of Education*, 598 F. 2d 535, 544 (10th Cir. 1979)." (631 F 2d 1300, 1305.)

III

The values accepted by the majority of the community are an appropriate basis for the local educational program.

In attempting to establish and maintain a moral and ethical basis for the educational program in a public school system, the

local board must necessarily choose some values over others. Clearly, the board member-petitioners in this case looked to the local community for these values. Whether this is the best source of such values should not be an issue for the courts to decide. All it need find is that it is an appropriate source of such values.

Numerous cases so indicate. In a typical case involving teacher dismissal for immorality, for example, the evidence showed that a male teacher had discussed sexual subjects with female students on a number of occasions unrelated to his teaching responsibilities. In upholding the teacher's dismissal, the court said in part:

> "Discussion of sexual subjects is a matter of particular sensitivity in society in general and when such discussion becomes part of a course of conduct by an individual, such conduct may be perceived by others as either amoral or immoral. . . . Where a teacher engages in such discussions outside the context of a classroom or a pedagogical setting, a school board, viewing these actions against the moral standards of the community, might well conclude that such conduct exceeds the bounds of propriety and fails to give students the proper guidance as to morals and standards of conduct which teachers should foster and encourage in their students. Such a finding is all that is necessary to deprive a teacher of the privilege of teaching children on the grounds that his conduct offended the moral standards of the community and set a bad example to the youth under his charge." *Penn-Delco School District v. Urso*, 382 A. 2d 162 (1978).

If the moral standards of the community are a sufficient standard by which to sustain the termination of a tenured teacher, there should be little doubt that these same community standards are an appropriate basis for action by the school board in the selection and maintenance of material for inclusion in its libraries.

Indeed, the fact that the petitioning board members are elected to their positions by that community creates a situation in which it should be expected that the members of the board

must reflect the moral values of the citizens who chose them. Admittedly, the community does not speak with one voice, and the board is bound to try to select those voices which are in the majority—not by law—but by the rules of political life. If they fail to do so, they will not be returned to their positions. In the instant case, however, five of the six board members who are petitioners have been successfully re-elected since the actions were taken upon which the respondents based their suit. (The other member did not choose to seek re-election.)

Contrary to the contention of respondents, it can be argued that it is the very failure of school boards to be willing to inculcate strongly-held community values which has led to the decline in support of public schools by the citizenry. Figures released by the National Center for Education Statistics indicate that private schools are holding their enrollment levels even for the past decade, in spite of an annual decline of more than one percent in the total school-age population, and serious economic pressures on parents occasioned by an inflation rate which continues to outpace income gains for most wage-earners.

Certainly there can be many reasons for the decisions of parents to transfer their children from public to private schools. But the previously quoted results of Gallup polls of attitudes toward public education suggest that the issue of moral standards may well be one of them.

IV

Even if removal of the library books at issue were based on matters of personal taste, the federal courts should not interfere with the proper exercise of authority by a local school board in the administration of its duties, absent a clear showing of impropriety.

There would seem to be little need for detailed explication of this point in our argument, and yet it seems to have been overlooked by the majority of the Second Circuit in its remand order. As Justice Frankfurter so ably expressed it in the famous flag salute case:

". . . the courtroom is not the arena for debating issues of educational policy. It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideas of democracy, while respecting at the same time individual idiosyncracies among a people so diversified in racial origins and religious allegiances. So to hold would in effect make us the school board for the country. That authority has not been given to this Court, nor should we assume it. *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). Reversed on other grounds by *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

On the specific subject of book selection these principles were clearly supported by the Tenth Circuit in *Cary* (cited supra) in which teachers claimed that their academic freedom was abridged when the school board prohibited the use of ten books in certain elective classes. The court recognized the authority of the board to remove the books even if its decision was educationally "wrong" or influenced by personal views of the board members, so long as there was no showing that the action was intended to promote a particular religious viewpoint, or to exclude any particular kind of thought. Similar conclusions were reached by the Seventh Circuit in *Zykan* (supra) regarding the removal of books from the school library.

And, in the very similar case of *Bicknell v. Vergennes Union High School Board of Directors*, 638 F2d 438 (2nd Cir. 1980), decided on the same date as the case now before this Court, the Second Circuit dismissed the plaintiff's complaint as having no legal basis so long as the board could reasonably conclude that the materials removed were vulgar or indecent.

The record in the case before this Court clearly indicates that these same objectives were the basis of petitioners' actions, and the selections from the books removed, fully cited in Judge Mansfield's dissenting opinion, more than adequately support the explanation given by the petitioners that ". . . the books . . . contain material that is offensive to Christians, Jews, Blacks, and Americans in general. In addition, these books contain obscenities, blasphemies, brutality, and perver-

sion beyond description." Nothing in the record would provide a basis for concluding that petitioners' actions were motivated by the kinds of impropriety cited in *Zykan* as inappropriate. The school boards and administrators of our public schools cannot be expected to perform their important and difficult jobs if they must bear the burden of persuasion which the majority of the Second Circuit would place upon them.

This Court's admonition in *Minersville* (supra) is not out of date. It was effectively repeated just a few years ago. Speaking for the Supreme Court, Justice White warned:

> "It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. . . . The system of public education that has evolved in this nation relies necessarily upon the discretion and judgment of school administrators and school board members, and Section 1983 [Civil Rights Act of 1871] was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violation of specific constitutional guarantees." *Wood v. Strickland*, 420 U.S. 308, 326 (1975).

We sincerely believe that the arguments presented in this brief demonstrate that there has been no clear violation of respondents' constitutional rights in the case at bar.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari to review the judgment and opinion of the Second Circuit should be granted.

Respectfully submitted,

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June 22, 1981

CORRECTED COPY

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CLERK

No. 80-2043

IN THE

Supreme Court of the United States

October Term, 1981

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26; RICHARD AHRENS, FRANK MARTIN, CHRISTINA FASULO, PATRICK HUGHES, RICHARD MELCHERS, RICHARD MICHAELS, AND LOUIS NESSIM,

Petitioners,

—against—

STEVEN A. PICO, by his next friend, FRANCES PICO; JACQUELINE GOLD, by her next friend, RONA GOLD; RUSSELL RIEGER, by his next friend, SAMUEL RIEGER; GLENN YARRIS, by his next friend, RICHARD YARRIS and PAUL SOCHINSKI, by his next friend, HENRY SOCHINSKI,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' BRIEF

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Petition for Writ of Certiorari Filed May 30, 1981
Certiorari Granted October 13, 1981

QUESTIONS PRESENTED

1. Whether a school board, acting under a state statutory duty to prescribe books to be used in its schools may be prohibited under the Constitution from removing from a school library or curriculum books which it believes to be educationally inappropriate for the school children?

2. Whether secondary school students have standing under the First Amendment to sue to compel a school board to retain on library shelves or in the curriculum books considered by the board to be educationally unsuitable as a result of application of the board members' personal moral, social, and political values?

3. Whether in order for a board of education to constitutionally remove books from curriculum or a school library for content based reasons it must sustain a burden of proving such removal had a substantial and material basis and that it complied with specific objective criteria?

4. Whether "political" motivation renders unconstitutional otherwise permissible actions by a board of education in removing books from a school's curriculum and library?

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OPINION BELOW

The opinion of the Court of Appeals is reported in 638 F 2d 404. The opinion of the active judges of the Second Circuit Court of Appeals denying *en banc* consideration and of the three judge panel appears in 646 F. 2d 714. The opinion of the District Court, Eastern District of New York is reported in 474 F. Supp. 387 (1979).

JURISDICTION

The judgment of the Court of Appeals was entered on October 2, 1980. A timely petition for certiorari was filed by Petitioners herein on May 30, 1981. An order granting the petition for certiorari was entered on October 13, 1981. This Court's jurisdiction is invoked under 27 U.S.C. 1254 (i).

STATUTORY PROVISIONS INVOLVED

N.Y. Education Law Sec. 1709 (McKinney's) reads in pertinent part as follows:

> "Sec. 1709. Powers and Duties of Boards of Education
>
> The said board of education of every union free school district shall have the power and it shall be its duty:
>
> * * * * *
>
> 3. To prescribe the course of study by which the pupils of the school shall be graded and classified...
>
> 4. To prescribe the text-books to be used in the schools....
>
> * * * * *
>
> 9. To take charge and possession of ... the books, apparatus, and all school property within its district; and the title of the same shall be vested respectively in said board of education....
>
> * * * * *
>
> 13. To have in all respects the superintendence, management and control of said union free schools....
>
> 33. To have in all respects the superintendence, management and control of the educational affairs of the district and, therefore, shall have all the powers reasonably granted expressly or by implication by this chapter or other statutes."

Sec. 701 of the Education Law, subdivision 1, states in pertinent part:

"In the several cities and school districts of the state,

boards of education ... shall designate text-books to be used in the schools under their charge."

Sec. 91.1 of the Regulations of the Commissioner of Education states:

"A school library shall be established and maintained in each school. The library in each elementary school shall meet the needs of the pupils, and shall provide an adequate complement to the various areas of the curriculum."

It also requires a minimum of 1,000 titles each for a junior and senior high school library.

STATEMENT OF THE CASE

This is a civil rights action brought against a school board as a result of the board's removal of nine books from the school library shelves and from use in the curriculum and of the placement of one book on a restricted shelf able to be obtained with parental approval. Plaintiffs are five secondary school students whose sole claim of constitutional impermissibility is that such actions were taken by the school board members "...because particular passages in the books offended their social, political and moral tastes and not because the books taken as a whole were lacking in educational value." (Par. 15 of Complaint, J.A. 4). Plaintiffs have agreed by means of the filing of statements pursuant to local Rule 9(g) that

> "Although the books themselves were excluded from use in the schools in any way, defendants have not precluded discussion about the themes of the books or the books themselves." (J.A. 140).

and

> "No teacher has been instructed not to discuss the books which were removed or to refrain from discussion or comment upon the ideas and positions they represent." (J.A. 20, 28, 138, 144).

All but one of the books contain "indecent matter, vulgarities, profanities, explicit descriptions of sexual relations, some perverted, or disparaging remarks about Blacks, Jews or Christ" 638 F. 2d 404, 419; See also excerpts, printed in footnote to dissenting opinion of Judge Mansfield below, in 638 F. 2d 404, 419-422.

The facts are briefly: Three board members obtained excerpts of allegedly objectionable book materials while attending a conference of a conservatively oriented educational organization.

Some time later two of them examined the school library card index to ascertain whether such volumes were being used by the school district. It was then ascertained that nine were. Subsequently two others were discovered. (J.A. 19, 21-24, 30-42, 53, 101, 102).

As a result the other members of the board of education, Superintendent of Schools and principals were informed and shown the excerpts. At a board meeting it was agreed to remove the subject books from the libraries so that the board could read and review them. Subsequently and at the urging of the Superintendent a committee comprising four staff members and four community members was appointed to review the volumes in question and make recommendations concerning their educational suitability and whether they were in good taste, appropriate and relevant. (J.A. 20, 24, 48, 49, 60, 62, 64, 65, 69 Neither such review nor any other form of review was required by any state statute or regulations or by the regulations of the school district.

The committee, after a series of meetings, rendered its recommendations to the board based upon the criteria referred to. The Committee voted unanimously on only two of the ten (the eleventh was unavailable) books reviewed. Two books were recommended permanently removed from the library—*Down These Mean Streets* by 5-3 and *The Naked Ape* by 6-2. There was a 4-4 split on two of the books and, after an initial 4-4 split regarding *Slaughterhouse 5* it was recommended to be placed on a restricted list by a 5-3 vote. (J.A. 26, 67-69).

The board, having by this time read all of the books in question, at a public meeting on July 28, 1976 considered each volume separately and as a result retained one book by 7-0; retained one on a restricted basis by 6-0 with one vote to retain it unrestricted; one was removed by a bare majority of 4 votes with 2 votes to

retain on a restricted basis and 1 for no restrictions; one was removed by a 5-2 vote and the balance removed by unanimous vote (J.A. 26, 27, 75-79). This action was commenced as a result.

Suit was originally commenced in the New York State Courts but since a cause of action was alleged under 42 U.S.C. Sec. 1983 the defendants removed the case to the District Court, E.D.N.Y. Plaintiffs moved to remand contending in support thereof that no substantial federal question of law existed by virtue of the ruling of the Second Circuit in *President's Council District 25 v. Community School Board No. 25*, 457 F. 2d 289, *cert. denied* 409 U.S. 998 (1972). The motion was denied.

Thereafter defendants moved for summary judgment annexing to the moving papers, in addition to affidavits of the board members and Superintendent, numerous board documents and releases, member's letters and other material illuminating the issue. (J.A. 21-122). Plaintiffs cross moved for summary judgment. Plaintiffs' cross motion was unsupported by evidentiary materials of any kind. Plaintiffs did not refute any of the allegations contained in defendants' moving papers as is required by Rule 56(e) F.R. Civ. P. Counsel for both parties assured Judge Pratt that the Court had sufficient evidence before it to render a judgment and that no trial was necessary.

The District Court (Pratt, J.) granted summary judgment to defendants holding that *Presidents Council*, supra, was controlling and that the right of a school board to remove library books which its members found inconsistent with the basic values of the community that elected it was resolved by the statement in *Presidents Council* that a book " '...improperly selected for whatever reason could be removed by the same authority which was empowered to make the selection in the first place.' " (457 F. 2d p. 293).

Plaintiffs appealed and in a sharply divided opinion the Second Circuit reversed and remanded for trial. Judge Sifton (sitting by designation) wrote the majority opinion with which Judge Mansfield sharply dissented contending, *inter alia*, that "...the majority unjustifiably overrules our sound decisions in the indistinguishable case of [*Presidents Council*, supra ...]" (638 F. 2d 419). Both judges felt there were sufficient facts before the court, as a result of the defendants' papers supporting the motion for summary judgment and depositions of two board members, to grant summary judgment (638 F. 2d 432), and both found no distinction between the case at bar and a companion case (*Bicknell v. Vergennes Union High School Board of Directors*, 638 F. 2d 438) (argued the same day and decided the same day in which dismissal of a complaint against a school board was affirmed.) Yet the case was remanded to trial—primarily to ascertain motivation.

Defendants moved for rehearing and suggested *en banc* consideration. After many months rehearing was denied and the active Judges of the Circuit split five to five on the suggestion for *en banc* consideration effectively denying same. Judge Mansfield dissented from such denial (with which dissent four other judges concurred) stating that "...nothing will be gained by a remand since Judge Sifton's view ... would virtually mandate a decision for the plaintiffs." (at 416, 417).

The Majority opinon of Judge Sifton held that as a result of the "...unusual and irregular intervention in the school libraries operations..." perceived by him the defendants had the

> ...burden of establishing that there was a substantial and material basis for their actions and that their actions were possessed of sufficient procedural regularity [by means of application of narrowly specific

> criteria] to give a better basis than guesswork as to how the board of education would act in the future with regard to similar issues. (638 F. 2d at 414, 417).

Judge Newman, concurring in the result felt that a trial was required to determine whether defendants' actions "...looking forward from the time they were taken created a sufficient risk of suppressing the ideas to constitute a violation of the First Amendment" (638 F. 2d 438. See also f.n. 9) but declined to join in requiring precisely drawn rules or guidelines.

Both majority judges perceived the issue of possible political motivation in the board's decision to be essential in determining constitutional permissibility.

Neither of the majority opinions addressed the issue of the plaintiffs' standing to bring suit under the "right to know" or "right to receive" doctrine recently expanded by the Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.* (425 U.S. 748 (1976) while the dissent rejected such doctrine as "...having no application to the facts of this case." (638 F. 2d 429).

SUMMARY OF ARGUMENT

The Court is presented with a classic conflict among competing concepts, all of which have historically received social and judicial recognition, but which have not yet been addressed by this Court in the context presented. The decision of the Court requires the striking of a delicate balance between the conflicting interests at stake in a manner that will not compel the federal court system to continuingly address the specifics of actions such as those complained of.

The requirement of judicial restraint has nowhere been as strong as when the courts are addressing the result of discretionary actions of local school boards acting under state statutory mandate. It has long been recognized that in such circumstances there is a much stricter and higher threshold for a finding of constitutional impermissibility. It will not be denied that the constitution has properly gained entrance to the nation's school houses, however the contexts in which such a principle has been recognized involve "purer" expression and more direct and personal student rights than those asserted here to question board determination of curricular materials.

The vast discretion afforded boards of education in this regard and the importance of local control of educational decision making and need for judicial caution were made plain by the Court in *Epperson v. Arkansas*, 393 U.S. 97 (1968) where not only the majority opinion (at 107) but Justices Black (at 111) and Stewart (at 115) cited the unquestioned right of school boards to choose curriculum. In stating the need for judicial restraint in public school matters the Court established the requirement of a sharp and direct implication of "basic constitutional values" before judicial interference is justified (at 104). The majority also implied that curricular decisions did not sharply and directly

implicate such values unless the teaching of a theory or doctrine or body of ideas was prohibited.

That such is not the case here is amply set forth in statements filed by the parties pursuant to Local Rule 9(g) (J.A. pp. 20, 128, 131, 138, 140, 144) and evidenced by the unopposed affidavit of the Superintendent of Schools (J.A. p. 121). These documents amount to an admission of Respondents that there has been no suppression of ideas and any attempt to compel a trial in an effort to ascertain what was already agreed is to usurp the lower court's valuable time.

Another deeply established and essential theory for the proper functioning of our public schools is that permitting (or even requiring) local school boards to establish and apply their curriculum in such a way as to transmit community values (*James v. Board of Education*, 461 F. 2d. 566 (CA 2, 1972). It is no doubt this prescriptive function of secondary education (as contrasted with the analytical or "marketplace of ideas" function of higher education) that makes so necessary local control and judicial restraint. Such a function, of necessity, requires subjective rationale in the decision making process.

It cannot be denied that, especially with a board function to transmit community values, there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral or political. Much has been made in the court below of the possibility of "political motivation" for the board's actions. Although the record discloses none it is submitted that such motivation would not taint their actions since a public school through its curriculum is an instrument of political socialization, the board is a political subdivision of the state and all school systems carry on some form of political indoctrination in the better sense of the word.

The interest of the state in protecting juveniles from the content of indecent expressions, has received approval from this Court in *Federal Communications Commission v. Pacifica Foundation* 438 U.S. 726 (1978) where the Court held that the F.C.C. may impose sanctions for broadcasting language found "indecent" though not obscene. Content regulation is admittedly scrutinized very carefully by the Federal courts, but it is asserted here that within the unique social structure of the public schools such scrutiny should give way to other compelling interests.

Not only are the student plaintiffs juveniles and thereby not possessed of as full blown a constitutional right as adults (*Ginsberg v. New York*, 390 U.S. 629 (1967), but there is serious doubt that they have standing to assert what rights they may have in the case at bar. They are not asserting a right of "pure speech" or even "symbolic speech", but are asserting a right to receive the information contained in the proscribed books. This right is derived, so they claim, from a line of "right to know" cases culminating in *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.* 425 U.S. 748 (1976). These cases are inapposite, however, since *Virginia Board* relates to purely commercial speech and neither it nor the prior cases concerned the limited rights of juveniles.

It should be remembered that the issue is not what a particular jurist would have done were the judge a board member, but whether the Federal Constitution mandates a review of decisions made by Petitioners on the basis of personal values. Their actions are subject to disapproval in the normal course of school board electoral politics. They must operate under the majority principles of municipal corporation law. To accede to the wishes of a militant few in their community would be to disregard their

electoral mandate. Were the students to prevail in their search for a due process hearing for library books once shelved, all prior "mistakes" in selection would be immutably cast in bronze.

Petitioners' actions have been rational and were in furtherance of a valid community interest. They were taken in the unique environment of the public schools. They possessed sufficient statutory and common law discretion to discharge their responsibilities in such a way as to outweigh the individual interests of the student plaintiffs.

1. THE BOARD POSSESSES THE STATUTORY AND COMMON LAW AUTHORITY TO MAKE DETERMINATIONS CONCERNING THE SUITABILITY OF CURRICULAR MATERIALS INCLUDING LIBRARY BOOKS AND IN DOING SO MAY VALIDLY ATTEMPT TO TRANSMIT COMMUNITY VALUES TO THE STUDENTS IN ITS CHARGE.

a. Board authority to establish curriculum.

The power of the state to establish a curriculum for use in the public schools has long been recognized by the courts. In *Meyer v. Nebraska*, 262 U.S. 390 (1923) the Supreme Court struck down a Nebraska statute which made it illegal to teach a foreign language to students who had not completed the eighth grade. In so doing Justice McReynolds, writing for the majority, cited the power of parents to control their children's education and acknowledged limitations on that power in the following language:

> The power of the state to compel attendance at some schools and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. (262 U.S. at 402)

Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court, citing *Meyer*, found a statute denying parents the right to send their children between 8 and 16 years of age to private schools unconstitutional. In its decision the Court reaffirmed the state's authority to control curriculum stating

> No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise

> and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught and that nothing be taught which is manifestly inimical to the public welfare. (268 U.S. at 543).

Although both of these cases were decided upon the basis of substantive due process and did not refer to the First Amendment the propositions cited above continue to reflect the present judicial understanding of a state's authority.

Such authority has been more recently reaffirmed by this Court in *Board of Education v. Barnette*, 319 U.S. 624 (1943) where (p. 631) the dissent of Justice Stone in *Minersville District v. Gobitis*, 310 U.S. 586 (1940) was cited in support of a state's right to compel the inspiration of patriotism and love of country. In *Epperson v. Arkansas*, 393 U.S. 97 (1968) Justice Fortas, for the majority, stated that the state had an "...undoubted right to prescribe the curriculum for its public schools..." (p. 107) while Justice Stewart, concurring, stated that "The States are most assuredly free 'to choose their own curriculums for their own schools' " (p. 115). The lower federal courts have continued to recognize the authority of the states over curricular matters. See *East Hartford Education Association v. Board of Education*, 562 F. 2d 838 (CA 2, 1977) p. 843; *Palmer v. Board of Ed. of City of Chicago*, 603 F. 2d 1271 (CA 7, 1979) p. 1273; *Clark v. Holmes*, 474 F. 2d 928 (CA 7, 1972), *cert. denied*, 411 U.S. 972 (1973); *Ahern v. Board of Education*, 456 F. 2d 399 (CA 8, 1972).

There are 16,500 school districts in the nation today whose operations and decision making processes are conducted in the large part by elective boards of education acting as political subdivisions of the state.* The state legislatures mandate basic core

*From 90% to 95% of the nation's school boards are elective.

requirements and have delegated the bulk of authority to these school boards either expressly or impliedly. Apart from mandated matters they historically exercise wide latitude and discretion.

In New York State there have been broad statutory grants of power to union free school districts, of which Island Trees is one. Among the broad powers granted Petitioner board is "To prescribe the textbooks to be used in the schools...", "To take charge and possession of [and title to] ...the books... within its district;..." and "To have in all respects the Superintendence, management and controls of said union free schools..." (See "Statutes Involved," supra).

Although New York State courts and administrative agencies have not addressed the precise issue at hand they have held that a board may in its discretion determine whether or not to provide a certain non-mandated course of instruction (*Matter of Serverski*, 7 Ed. Dept. Rep. 79 (1967); a board may determine the character and extent of instruction (*Matter of Academic Instruction of Children U.F.S.D. #4* 10 St. Dept. Rep. 449 (1916); a board may not be compelled to remove instructional materials to which parents object (*Rosenberg v. Board of Education* 92 N.Y.S. 2d 344 (1949); the right to select instructional materials is a matter of public policy and therefor not a mandatory topic of union bargaining (*Matter of Orange County Community College Faculty Association*, 9 PERB 3068 (1976) and that a board may discontinue a periodical to which is has previously subscribed (*Matter of Kornblum*, 70 St. Dept. Rep. 19 (1949) .)

In exercising their discretion under the broad powers and responsibilities to establish courses of instruction and to prescribe curriculum school boards should and do transmit the consensual values and attitudes of the school community to the students in their charge. It is this effort at inculcating and indoctrinating

community values that sharply distinguishes the nation's secondary schools from its universities and colleges where a less prescriptive "marketplace of ideas" or analytical model governs. (Goldstein, S., *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. Pa. L. Rev. 1293, 1297, 1342-44 (1976).

This conception of the role of secondary education in our society has been accepted by the courts of the nation and is an essential and obvious concomittant to the traditional theory requiring local control of public education. Professor T. Emerson in *Developments in the Law—Academic Freedom*, 81 Harv. L. Rev. 1045 (1968) p. 1149 has reflected on this link by stating that "Public opinion strongly supports continued local control apparantly because local responsibility tends to insure that educational policies reflect the needs of the individual community."

b. **Duty to transmit community values to students.**

In *East Hartford Ed. Assn. v. Bd. of Ed.*, 562 F 2d 838 (CA 2, 1977) p. 859 the Second Circuit sitting *en banc* affirmed the statement in *James v. Board of Education*, 461 F 2d 566 (CA 2, 1972) p. 573 that a "principal function of all elementary and secondary education is indoctrinative ... to transmit the basic values of the community."*

The transmission of community values by the elementary and secondary schools of the nation fulfills not only the function of reflecting "the value system and educational emphasis which are the collective will of those whose children are being educated and

*If, as stated by V.O. Key, Jr. in *Public Opinion and American Democracy* (1961), all national educational systems indoctrinate students with basic values, outlooks and beliefs which values "permeate the entire school curriculum from the kinds of problems posed in arithmetic to the formal instruction in civics" (at p. 316) it is little wonder that such is also the role, on a different scale, of the diverse independent school districts comprising the national system.

who are paying the costs" (*Cary v. Board of Education*, 598 F. 2d 535 (CA 10, 1979) p. 543). It celebrates the wonderful diversity of this nation.

One of the great strengths of our Nation is its variety of cultures, beliefs and values. The school districts of America come in all sizes and shapes and emphasize, within their state mandates, a bewildering variety of values. Some believe in high rates of expenditure; some grant great freedom and leeway to teachers and students; some believe that the "basics" are to be emphasized rather than far reaching electives; some are peopled by wealthy college graduates and others by less affluent blue collar workers, and on *ad infinitum*.

There are changes within the same district from time to time as demographic and social changes occur there and in surrounding areas. Not to permit a board of education to utilize its own values and probably, since these are elected officials, those of the community in its decision making process would cast a true "pall of orthodoxy" over the educational process. The Court in *McCollum v. Board of Education*, 333 U.S. 203 (1948). Justice Jackson concurring at p. 237, recognized this changing nature of school boards when he noted that they represented and served "highly localized groups which not only differ from each other but which themselves from time to time change attitudes." (See also *Abington Township v. Schempp*, 374 U.S. 203 (1963) p. 300; *Ambach v. Norwick*, 441 U.S. 68 (1979) p. 77).

Island Trees is a distinctive community separate and apart in many respects from many other school districts in the county in which it is located. It is identifiable in only one context—that of a school district. There is no post office address known as Island Trees.* There is no Village with its identifying features of a commons or a Main Street, a Mayor and Village Council and

*It is part of Levittown, N.Y. for mailing purposes.

businessmen's clubs. There is no separate fire department or police force. There is only the school system as a source of a distinctive identity and as such it assumes tremendous importance to its residents and electors. Its tax base can be (and is) vastly different from that of other districts in the county. Its socio-economic makeup is different.* Its residents have certain values and interests which have drawn them to this community. It has elected (and re-elected on a number of occasions after the events giving rise to this litigation) The Petitioner board of education with the tacit understanding that it will perform its duties in such a way as to transmit the basic values of the community to the district's students in accordance with the prescriptive model referred to.

c. Need for value judgments by board.

The nation's public schools are in trouble. Although our youth are better educated than ever, our adults are enjoying a higher standard of living than previously, we are educating more universally in less segregated systems—our secondary schools are in trouble. Academic standards are diminishing, disciplinary problems and vandalism are increasing, funding is diminishing and students who are able are avoiding the public schools in favor of private. Our school curricula have become debased and watered-down and there is an ever recurrent fear of diminishing moral and social values being taught as a result of a "crisis of authority." See Brief of *amicus* National Association of Secondary School Principals, p. 12; Daedalus: Journal of the

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*In *The New York Times Guide to Suburban Public Schools*, Macroff, G., (1976), it is described as "a blue collar district in southeastern Nassau County that is not even a real community...very, very middle class in make-up..[with a] miserable tax base" (p. 35)

American Academy of Arts and Sciences (1981) Kerst, M., *Loss of Support for Public Secondary Schools: Some Causes and Solutions* (pp. 45-68), Cohen, D., *The Failure of High Schools and the Progress of Education* (pp. 69-89), Grant, G., The *Character of Education and the Education of Character* (pp. 135-149); The Washington Post 11/3/81, Williams, J. *The Lure of Private Schools; Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1968) dissent of Justice Black at pp. 524-526.

In addition there is ever diminishing discretion vested in local school authorities as a result of increased mandates resulting from the expanding role of federal and state regulation, increasing involvement of advocacy groups active in the nation's courts and burgeoning representation of school board employees by unions and the resultant labor contracts. One of the few areas of discretion left to the local boards is that of curriculum and that too is somewhat limited by the materials made available by the book publishers and instructional material suppliers.

This last remaining prerogative has of late been subject to numerous attempts at encroachment by professionals seeking greater power than that gained in collective bargaining. The brief of the New York State United Teachers in the court below asserted the right to select texts. No doubt the American Library Association will assert a similar right regarding library books. It must be remembered however that although a teacher is equipped by special training to decide matters of pedagogical methodology one, especially if a non resident, should not be able to make important value judgments concerning the environment a district wishes for its children.* Goldstein, S., 124 U. Pa. L. Rev. 1293 (1976) pp. 1335-39, 1356.

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*A survey taken at the time the events complained of occurred showed that only 5% of the professional staff of Island Trees resided in the district. (Oglesby aff. J.A. 118).

That teacher control of curriculum is at variance with the principle that inculcation of societal values is a major function of American public education is aptly shown by the statement of the District Court in *Mailloux v. Kiley*, 323 F. Supp. 1387, 1392, 436 F. 2d 565, after dismissal, aff'd. 448 F. 2d 1242 (CA 1, 1971) that

> The secondary school more clearly than the college or university acts *in loco parentis* with respect to minors. It is closely governed by a school board selected by a local community. The faculty does not have independent traditions, the broad discretion as to teaching methods, nor usually the intellectual qualifications, of university professors. Among secondary school teachers there are often many persons with little experience. Some teachers and most students have limited intellectual and emotional maturity. Most parents, students, school boards, and members of the community usually expect the secondary school to concentrate on transmitting basic information, teaching "the best that is known and taught in the world", training by established techniques, and to some extent at least, indoctrinating in the mores of the surrounding society. While secondary schools are not rigid disciplinary institutions, neither are they open forums in which mature adults, already habituated to social restraints, exchange ideas on a level of parity. Moreover, it cannot be accepted as a premise that the student is voluntarily in the classroom and willing to be exposed to a teaching method which, though reasonable, is not approved by the school authorities or by the weight of professional opinion. A secondary school student, unlike most college students, is usually required to attend school classes, and may have no choice as to his teacher.

In applying the First Amendment in the contexts set forth above there has to be cognizance of the fact that value judgments must be made constantly by those charged by the electorate with transmitting the community's moral and societal values,

especially as regards instructional materials such as texts and library books. These decisions pose many problems in the areas of academic freedom and freedom of expression for both the teachers and the students of a given district and have spawned much litigation.

No determination has yet been made by the Supreme Court regarding the extent to which a school board member may utilize personal values in making curricular decisions within permissible constitutional limits. In applying First Amendment principles in a public school context cognizance of the fact that it is necessary to make these value decisions must be taken. An awareness of the uniqueness as well as the importance of public education and the need for judicial restraint must be kept paramount in doing so. The constitutional role of a school board in public education is at the heart of the controversy before the Court.

II. THE BOARD'S ACTION IN REMOVING CERTAIN VOLUMES FROM LIBRARY SHELVES AND FROM USE AS TEXTBOOKS DID NOT INFRINGE UPON PLAINTIFF STUDENTS' FIRST AMENDMENT RIGHTS AND DOES NOT JUSTIFY JUDICIAL INTERVENTION.

While it is unquestionable that "education is perhaps the most important function of state and local governments" *Brown v. Board of Education,* 347 U.S. 483 (1953) p. 493; that "boards of education are traditionally charged with broad power to formulate and implement educational policy" (*Swann v. Board of Education,* 402 U.S. 1 (1970) p. 16) and that value inculcation is a primary function of local boards of education it is equally true that students do not "shed their constitutional rights at the schoolhouse door." *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) p. 506. Most of the decisions involving the necessary careful balancing of these conflicting interests have arisen at the college or

university level, have involved employment rights of staff members or have involved much purer expression than that in question in the case at bar. Some guidance can be obtained however from an examination of the principles addressed in these cases if not from a comparison of the fact situations.

a. The need for judicial restraint.

An Arkansas statute making it unlawful for a teacher to teach the doctrine of evolution was addressed in *Epperson v. Arkansas,* 393 U.S. 97 (1968) in which all but two of the Justices of the U.S. Supreme Court held that the statute violated the establishment of religion clause of the First Amendment while the remaining two found it to be unconstitutionally vague. Although the Court declined to rest its decision on academic freedom grounds it recognized the difficulty of applying First Amendment principles in the unique environment of the public schools. At p. 104 the majority stated:

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief. By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.

and stressed the necessity of constitutional safeguards and the avoidance of a "pall of orthodoxy" in the nation's schools.

The federal court system has continued to recognize the need

for extreme caution in involving itself in the decision making processes of the public schools. The U.S. Supreme Court in *McCollum v. Board of Education*, 333 U.S. 203 (1947) p. 237, (Jackson, J. concurring), has stressed the importance of not being induced "to accept the role of a super board of education for every school district in the nation." Citing the "subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncracies among a people so diversified..." the Court in *Minersville District v. Gobitis*, 310 U.S. 586 (1939) p. 598 eschewed turning "the courtroom into an arena for debating issues of educational policy." In the more recent case (involving school segregation) of *Millikin v. Bradley*, (433 U.S. 267) (1977) the Court stressed the need to take local school authorities' interest in self management into account in fashioning remedies.

This natural and historical disinclination is even more necessary in such sensitive areas as that involved in the case at bar, i.e. the exercise of moral value judgments. Petitioner board members do not profess the technical expertise of their librarians or the knowledge of literature possessed by the teachers of English. It is possible that they have made an unwise or imprudent decision or one with which possibly no member of the Court would agree, but the question is not how this Court would act were its members board members, but whether the Federal Constitution commands this or a trial court to review a decision which board members have made on the basis of their personal opinion of educational suitability. (*See Miller v. School District #167*, 495 F. 2d 658, rehearing denied 500 F. 2d 711 (CA 7, 1974) p. 666, Opinion of Stevens, J. upholding termination of non-tenured teacher due to board disapproval of his beard and sideburns). Petitioner school board members had a difficult and delicate task, but they exercised their discretionary power over curricular materials in the way they believed to be best at the time. It is submitted that an

affirmance of the decision of the lower court herein would create an even more "unprecedented intrusion into the process of elementary and secondary education" than that which the minority foresaw in *Goss v. Lopez*, 419 U.S. 565 (1975) at p. 585.

b. The student plaintiffs possess no standing to assert First Amendment rights or at best, possess substantially diminished First Amendment rights.

Respondents were juveniles at the time the events complained of took place. Although there have recently been judicial diminutions in the disparity between juvenile and adult constitutional rights there is still no question whatever but that the "experience of mankind, as well as the long history of our law" recognize vast differences between the rights and duties of children as compared with adults which "must be accomodated". *Goss v. Lopez*, 419 U.S. 565 (1975) dissent at p. 591 citing Mr. Justice Stewart's concurrance in *Tinker v. DesMoines*, supra p. 515. See also *Quarterman v. Byrd*, 453 F. 2d 54 (CA 4, 1971) pp. 57, 58; *Ginsberg v. New York*, 390 U.S. 629 (1967) at 638; *Russo v. Central School Dist.* 469 F. 2d 623 (CA 2, 1972) p. 631.

It is very much in doubt however whether these particular juvenile plaintiffs have any standing whatever to assert First Amendment rights in the context of Petitioners' actions. The First Amendment guarantees freedom of expression and there is no question but that this guarantee has been expanded beyond the ambit of pure speech to symbolic expression and has been extended to protect juveniles in the school environment. It has not yet however been extended to protect a student who wishes to read instructional materials deemed inappropriate for whatever reason.

The students' First Amendment claims must be founded on the "right to receive" information referred to by the Sixth Circuit in a very similar case (*Minarcini v. Strongsville City School Dist.*, 541 F. 2d 577 (1976). In holding that the removal by a school board of library books because they were socially and politically distasteful violated the First Amendment the court, after referring to the "right to know" as a "somewhat more difficult concept than a direct restraint on speech" (at 583), recited the line of authorities establishing such a right. The Court admitted to doubtfulness "absent [the] very recent Supreme Court case" of *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.* 425 U.S. 748 (1976).

In *Virginia State Board of Pharmacy*, supra, the Court struck down a state statute banning price advertisements at the request of consumers citing, among others, *Lamont v. Postmaster General*, 381 U.S. 301 (1965), *Kleindienst v. Mandel*, 408 U.S. 753 (1972) and *Procunier v. Martinez*, (460 U.S. 396) (1974) for the proposition that First Amendment protection is afforded both the source and recipients of communication where a "speaker" exists (425 U.S. at 756). The Court described the right to receive information as a "reciprocal right" (at 757).

In *Lamont*, supra, the Court upheld the rights of adult citizens to receive political publications sent from abroad striking down a regulation requiring the filing of a signed card for each piece requested. It did not hold that an addressee has a constitutional right to receive particular materials through the mails. In *Kleindienst*, supra, the Court upheld the exclusion of a Communist scholar from the country, depriving his audience of their "right" to hear his message. The decision was based upon the greater plenary power of a sovereign nation to bar aliens, but the Court recognized that First Amendment rights were implicated. *Procunier v. Martinez* involved broadly written prison regu-

lations permitting censorship of mail. In striking down the regulations because they did not "further an important or substantial government interest unrelated to the suppression of expression", (at 413.) Justice Powell suggested that a less far reaching statute directed at suppressing material jeopardizing legitimate government interests would be upheld (at 416). It is understandable that the *Minarcini* court would have found it difficult to support the students' claimed "right to know" without the support of *Virginia State Board of Pharmacy*, supra.

None of the cited cases dealt with the need for balancing important limitations upon First Amendment protections; all concerned adult claims; none touched upon the unique environment of the public schools and all involved a reciprocal communicator in whom was vested definitive constitutional rights.

Virginia State Board of Pharmacy, supra, upon which most courts supporting a student's "right to know" rely, is even more readily distinguishable. It involved solely commercial speech and, since the courts must pay heed to the " 'commonsense differences' between commercial speech and other varieties (*F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978), p. 744, citing *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)), cannot be controlling in the case at bar. This Court itself has recently described *Virginia State Board of Pharmacy* as holding that "the First Amendment affords some protection to *commercial speech*" (*Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), rehearing denied 429 U.S. 873 (1976), p. 68, emphasis provided) and has further referred to having "swept even the most banal *commercial speech* within the ambit of the First Amendment" in *Virginia Board (Village of Schaumberg v. Citizens for a Better Environment* — U.S. — (1980), dissent of Justice Rehnquist, emphasis provided.)

More important, however, than attempting to distinguish

Virginia State Board of Pharmacy is to show its inapplicability to the case at bar on more substantive grounds. In permitting the appellees in *Virginia Board* to assert the reciprocal of the right to advertise, e.g. the right to receive the advertising (p. 757) the Court recognized that wherever the "right to receive" was asserted it could not stand on its own, but must be grounded in its reciprocal —a right to express communication in some form. Since the publishers and authors of the books at issue herein would possess no conceivable right to bring an action against Petitioners on First Amendment grounds how possibly can the student Respondents successfully assert a reciprocal right?

The illogic of thus applying the holding in *Virginia Board* has been apparent to all Circuit Courts considering "book banning" litigation since the Sixth Circuit in *Minarcini*, supra, seized upon it in an attempt to support the students' otherwise doubtful claim. Even the Second Circuit while deciding the case at bar made no comment either way concerning the existence or non-existence of a "right to know" which, standing by itself, could support the students' claim, although the matter had been briefed and argued before it. However, Judge Mansfield in his dissent (638 F. 2d 404, 429) stated that he considered that the viability of the holding in *President's Council, District 25 v. Community School Board, No. 25* (457 F. 2d 289 (CA 2, 1972), *cert. denied*, 409 U.S. 998) that a board's removal of a book from a school library because it was offended at its content did not violate the First Amendment, was undiminished. Judge Mansfield directly rejected the pertinency of *Virginia Board* since the students' rights were no greater than those of the authors and publishers of the books. The fact that the companion case to the one at bar, *Bicknell v. Vergennes Union High School Board of Directors*, 638 F. 2d 438 (CA 2, 1980), concerning similar circumstances, was decided in favor of the school board without any comment whatsoever regarding the import of *Virginia Board* indicates its rejection as irrelevant.

The Seventh Circuit in *Zykan v. Warsaw Community School Corporation*, 631 F. 2d 1300 (1980) p. 1304, after referring to "the qualified 'right to hear' that has lately emerged as a constitutional concept. (citing *Virginia Board*)", proceeded to reject its applicability as a result of the presence of two factors already referred to above i.e. the lesser constitutional rights flowing to a juvenile than to an adult and the necessity for transmitting moral values to students of the public schools. It appears clear therefor that although there has been a gradual extension of a qualified right to receive information as a constitutionally protected right under the First Amendment it has not yet been applied to the non adult, non commercial environment of the secondary schools. Nor can nor should it be. It exists only as a reciprocal right gaining vitality as the result of anothers right to affirmatively communicate. Publishers and authors do not have such a right with respect to the public schools and students do not possess its reciprocal. If they did could they not extend it to affirmatively compel the acquisition of desired instructional materials or the revision of a curriculum. Since they do not possess the greater right to an education (*San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973) it would be surprising if they possessed a lesser one to direct the content of an education.

In the case at bar the information which Respondent students seek to "know" is readily available from other sources.* It has been stated in *Connecticut State Federation of Teachers v. Board of Education*, 538 F. 2d 471 (1976), in a matter where the court held a teachers' union not to have a First Amendment right to utilize teacher mailboxes for distribution of union literature, that

> The availability of alternative means of communica-

*It is interesting to note that the nine "banned" volumes were subsequently placed in a special showcase at the Island Trees Public Library and sustained extremely heavy use from the public library borrowers after the events complained of.

> tion is a relevant factor in any case in which First Amendment rights are arrayed against asserted governmental interests. (citations omitted) (at 481).

This Court in *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978) f.n. p. 750, recognized the importance of alternative means by commenting on the ability of adults to obtain tapes of indecent materials banned by the F.C.C. because of probable exposure to children. See also *Kleindienst v. Mandel*, supra, p. 765 where this Court referred to alternative means of access as a "relevant factor" should a balancing of rights be called for.

c. The school board may make a content based decision as a result of personal judgment as to suitability of instructional materials.

The public has a legitimate interest, expressed through its elected school board, in promoting respect for decency, authority and other traditional values. In utilizing the members' personal value sets while exercising their broad discretionary powers regarding curriculum they are compelled to make subjective content based decisions. It is the nature and essence of the office they hold and of the trust imposed upon them by virtue of their election as stewards of the district's school age children for whom they stand *in loco parentis* during the school day. To do less would be a violation of trust. In applying their concept of educational suitability to library (and other) materials as part of the decision making process they are not attempting to be ideological proselytizers. They are making sensitive and difficult decisions whether or not these specific materials are consistent with basic community values in an effort to comply with their legislative and philosophical mandate.

There are limitations on the First Amendment guarantees of free speech even in the context of subjective content based restrictions thereon. See *Chaplinski v. New Hampshire*, 315 U.S. 568 (1941) holding that a statute punishing the use of "fighting words" did not impair liberty of expression; *Ginsberg v. New York*, 390 U.S. 629 (1967) upholding a statute barring the sale of materials not considered obscene for adults to persons under seventeen years; *F.C.C. v. Pacifica Foundation*, supra, permitting the imposition of sanctions against a radio station for broadcasting language found "indecent" though not obscene. See also *Young v. American Mini Theatres, Inc.*, supra at 2451, where the Court made it "clear, however, that the content of a particular advertisement may determine the extent of its protection."

If the protections afforded by the First Amendment are not absolute; if indecent language can be regulated and if the nation's public schools are truly unique it follows that the board's actions need only meet a very low threshold of constitutional scrutiny.

The students may well argue that the language objected to by Petitioners was no different from that to which they were exposed when not at school. This is still no reason why the school board must place its imprimatur on such language or to give it an appearance of legitimacy.* There is no reason why the matters attempted to be communicated by the authors of the proscribed volumes could not be done so with less explicitness, less vulgar language, fewer sexual allusions and in a more tasteful manner. As Justice Stevens, writing the plurality opinion in *F.C.C. v. Pacifica*, (p. 743 n. 18,) observed—"There are few, if any, thoughts that cannot be expressed by the use of less offensive language." It is doubted that the more "prudish" values of the 19th Century "in any way limited or affected expression of serious literary, artistic,

*For a detailed statement of the language deemed unsuitable by the board see Judge Mansfield's dissent in the lower court. (638 F. 2d. 404, F.N. 1 pp. 419-422)

political or scientific ideas." (*Miller v. California*, supra, at p. 35, Justice Black dissenting.)

Respondents may not find solace in the holding of this Court in *Cohen v. California*, 403 U.S. 15 (1971) reversing the conviction of Mr. Cohen for having worn a jacket bearing a four letter expletive in a courthouse. It is suggested that Mr. Cohen could have been constitutionally barred from a schoolhouse.

Tinker v. Des Moines, supra, is also inapposite for a number of reasons. The foremost distinction is the nature of Mr. Tinker's expression. It was "closely akin to 'pure speech.'" (393 U.S. at 505.) and it must be remembered that "As conduct becomes less and less like 'pure speech' the showing of governmental interest required for its regulation is progressively lessened (citations omitted)." (*East Hartford Ed. Ass'n. v. Bd. of Ed.*, 562 F. 2d 838 (1977) p. 858.)

There is guidance for the Court, however, in a number of cases involving teacher dismissals for the alleged exercise of rights protected under the First Amendment. Their pertinence is greater in view of the seriousness of termination of employment or other disciplinary action and of plaintiffs' adult status as well as the "pureness" of their speech.

In *East Hartford*, supra, the Second Circuit, sitting *en banc*, reversed the holding of a three judge panel and upheld the constitutionality of a teacher dress code. In *Palmer v. Board of Education*, 603 F. 2 1271 (1979) the Seventh Circuit upheld the dismissal of a teacher who refused to teach a certain curriculum because she was a Jehovah's Witness, the court basing its decision on the "traditionally broad discretion that has always rested with local school authorities to prescribe curriculum." (p. 1273). In *Brubaker v. Board of Education* the Seventh Circuit sitting *en*

banc upheld the dismissal of a teacher for distributing what the board felt was an indecent poem and brochure in class. (502, F. 2d 973 (1974). Citing the power of the state to control curriculum, the District Court (E.D. Mich.) in *Mercer v. Michigan Board of Education*, 379 F. Supp. 580 (1974), aff'd mem. 419 U.S. 1081 (1974) held that a teacher's academic freedom rights were not infringed by a statute prohibiting discussion of birth control in class. See also *Clark v. Holmes*, 474 F. 2d 928 (CA 7, 1972), *cert denied* 935 Ct. 2148 (1973); *Adams v. Campbell City School District*, 511 F. 2d 1242 (CA 10, 1975); *Hetrick v. Martin*, 480 F. 2d 705 (CA 6, 1973).

In *Powers v. Mancos School District*, 539 F. 2d 38 (CA 1976) the plaintiff alleged termination as a result of board objection to his presentation in class of "works of art". In sustaining the trial court which found his exercise of First Amendment rights had not been shown to have played a part in his termination, the court stated (regarding the process of determining whether or not to terminate a teacher)

> ...[I]t would be unrealistic to deny to Board members the right to employ subjective rationale in the decisional processes. Subjective considerations are of course those personal to the individual Board members....
> We suggest that it is both impossible and inadvisable to eliminate subjective rationale from the decision making process...
> In any event, courts are well-equipped to exercise processes superior to those persons empowered by statutes to operate schools. (p. 44)

The "ultimate necessity of subjective judgment" regarding the selection of written materials for voluntary public consumption was cited by the First Circuit in *Advocates for the Arts v. Thomson*, 532 F. 2d 792 (1976) (p. 797) in upholding the state's

refusal to approve a grant for an art magazine due to allegedly indecent materials that it contained. It is respectfully suggested that this Court also recognize the necessity of subjective judgments in the delicate task of governing the nation's public schools.

III. THE BOARD'S ACTIONS WERE NOT IRRATIONAL OR ARBITRARY; WERE NOT IN FURTHERANCE OF THE SUPPRESSION OF IDEAS; WERE NOT UNCONSTITUTIONALLY MOTIVATED; WERE NOT SUBJECT TO A NEED FOR NARROWLY DRAWN REGULATIONS AND MET ALL APPLICABLE CONSTITUTIONAL STANDARDS.

a. Petitioners have not acted unreasonably, arbitrarily or irrationally.

During the course of this litigation the school board has been accused of all forms of unconstitutional behavior by opposing counsel, Respondents' *amici* and the press. It has been charged that they have suppressed ideas, acted from political motivation, cast a "pall of orthodoxy" over the school system, excluded unpopular viewpoints, and have been in general arbitrary and irrational.* However, if one can stand free of the emotions and turmoil normally touching events such as these and view the record rationally it is difficult not to agree with Judge Mansfield when he stated (p. 422) that "the Board acted carefully, conscientiously and responsibly after according due process to all concerned." When a respected jurist such as Judge Mansfield can come to that conclusion after an exhaustive review of the record how possibly can

*The Second Circuit warning in *President's Council*, supra (p. 292) of the probability of "ensuing shouts of book burning, witch hunting and violation of academic freedom" was unerringly predictive of events.

Petitioners' actions be considered arbitrary and irrational.*

A review of the materials objected to (J.A. 30-42; 638 F. 2d pp. 419-422 F.N. 1) and of the public statements of the board at the time (J.A. 89-98) does not support a description of the board's actions as arbitrary or irrational.

A review of the depositions of the two members whom Petitioners chose to examine under oath also indicate a variety of reasons for their respective votes on the different books proscribed by the board. It becomes obvious that the board did not speak as a single precise voice, all objecting to the same aspect of each volume.

Defendant board is composed of seven members from varying backgrounds who voted variously with regard to the books in question. Mr. Nessim, Jewish, voted to place *Go Ask Alice* on a restricted shelf; to restore *The Fixer* to open shelves; and (along with Mr. Martin) to restrict *A Hero Ain't Nothin But A Sandwich*. The same Mr. Martin voted, with Mr. Michaels, to restrict *The Fixer*. (J.A. 27, 77-79). They all had varying reasons for their vote, but all were basically concerned about the lack of educational suitability of these volumes due to the rampant obscenities, vulgarity, gross sexual allusions, blasphemies (in 1 book) and their general bad taste (J.A. 9, 26, 28, 90-99, 103, 105, 107-110, 119, 120).

A board member should not be faulted for stating:

> I know in the past students have been suspended for

*For other judicial appraisals of some of the materials proscribed by Appellant board see *Todd v. Rochester Community Schools*, 200 N.W. 2d 90 (1972) (description of "Slaughterhouse-Five") and *President's Council*, supra, p. 291 (describing "Down These Mean Streets").

> using such language. That is my whole point. If you can't allow a student to use it in the classroom in a discussion or in a description of a particular teacher that he or she may not like, I don't see how you can justify using it in books that are used in the classrooms.

(Ahrens dep. at 113.) Nor can Frank Martin's three category system be faulted as irrational. Mr. Martin was very aware that a few expletives in a whole work might not justify proscription. He stated "if the words fit into the story, then, perhaps in some cases this enhanced the story" he would vote to keep the book on the shelves on a restricted basis. If, however, he "felt a book was just written for the purpose of using obscenities" or "it went into completely deviant behavior, explicit sex scenes, that type of thing" it was in category three which justified complete proscription. (Martin dep. at 28, 29.) These are not the workings of irrational minds. Mr. Martin had read four of the books in question even before he realized they were in the school library and had formed an opinion concerning them. (Martin dep. at 35; J.A. 23, 103) All board members had read each book before casting a vote on July 28 (J.A. 26, 103, 119). This does not support a charge of irrationality.

Viewed dispassionately the board's actions have been a rational, logical exercise of their discretionary powers. *Someone* has to make a choice regarding the educational suitability of instructional materials. It has already been shown that the staff professionals are not the proper parties (See Point I, p. 20) Nor are the parents, except through the duly elected school board which serves in their stead during the school day.* If a parent lacks the power (except through the elective process or by persuasion)

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*For an exposition of the doctrine of *in loco parentis* as it relates to public school affairs see *The Scope and Sources of School Board Authority to Regulate Student Conduct: A Nonconstitutional Analysis*, Goldstein, S., U. of Pa. L.J. 117: 373 at 377-84 (1969).

to compel a school board to adopt or to enjoin its discontinuance (assumedly on the basis of subjective criteria) and a student lacks similar power (as is here asserted), to deny a board such power would create a vacuum where value judgments have no place.

Such a vacuum is supported by the students' cries of "majoritarianism". A closer examination of the corporate nature of Petitioner school board and its rules of procedure will indicate that it can only operate through a majority. If four of its members wish to transfer an additional $20,000 to the library budget for acquisition of additional library materials and three desire to reduce the library allocation by a similar sum the majority prevails and the library receives the books. As can be seen from an examination of the board minutes pertaining to the book removals complained of (J.A.75 80), the majority prevailed and it must prevail in a municipal corporation. The majority also prevails at the annual board member elections at which Petitioners were re-elected on numerous occasions.* (J.A.-81).

The illogic of a charge of "majoritarianism" is aptly illustrated by the holding and reasoning of the court in a similar case involving the action of a school committee (board) in removing an anthology which contained what could only be called a vulgar poem from a school library. In *Right to Read Defense Committee v. School Committee of the City of Chelsea*, 454 F. Supp. 703 (D.C. Mass. 1978) where after describing the poem as employing "vivid street language, and legitimately offensive to some, *but certainly not to everyone-*" (emphasis provided) (at 714), the Court directed the return of the book to the school library (after a six day trial). The implication, of course, is that unless material is deemed offensive by "everyone" it enjoys constitutional sanction and justifies judicial intervention and a full

*By state statute one third of a seven member school board (2, 2 and 3 members) stand for election every year.

blown trial. This cannot be the wisest way to challenge the dangers of "majoritarianism."

Of equal interest, similarly illogical and also addressed in *Right to Read* (supra) is the concept of "a book acquiring tenure by shelving" which was sharply rejected by the Second Circuit in *President's Council* (supra) when the court (457 F. 2d 289 at 292) stated

> This concept of a book acquiring tenure by shelving is indeed novel and unsupportable under any theory of constitutional law we can discover.

However, bolstered by the holding in *Minarcini,* supra, (that permitted *Catch 22* not to be acquired by a board as a text or library book but enjoined its removal from a library (541 F. 2d at 577) the District Court in *Right to Read* compelled the restoration of the book to the shelf stating

> Clearly, a school committee can determine what books will go into a library and, indeed, if there will be a library at all. But the question presented here is whether a school committee has the same degree of discretion to order a book removed from a library. (at 711).

A similar theory asserted by teachers challenging the discontinuance of a number of books from existing courses of study has been rejected by the Tenth Circuit in *Cary v. Board of Education,* supra. There the teachers contended that "once the courses had been approved the teachers' 'right of academic freedom' includes the right to use non-obscene materials" in them. (598 F. 2nd at 543).

An understanding of the usual selection process is helpful in realizing the fallacy of a constitutionally protected tenure concept

for a public school library book. It is admitted that most boards of education rely upon the judgment of their library professionals in making single volume purchases (as contrasted with text-book selection which, at least in Island Trees, is commonly done by the board from ones submitted). Those professionals in turn, it is hoped, rely upon established and unbiased trade journals.

However, the lack of bias on the part of the professional and of the trade journal or book list publisher is an assumption not necessarily founded in fact. Many librarians are biased and/or incompetent (as are many of any other occupational group). Many may have prejudices of which they are not even aware. Coupling this factor with that already addressed (Point I, p. 17) of the changing nature of school district community attitudes over long periods, one has a situation where "wrong" books may end up on a library shelf, but the body duly constituted to transmit the community's values to the school students will not have the power to correct the "error" by a method which involves subjective value judgments of a board of education. The *Guidelines for The Selection of School Library Resources, Textbooks and Other Instructional Materials* issued by the New York State Board of Regents (which did not obtain at the time of the events complained of) makes no distinction between books that are on and those that are off a library shelf, nor, it is doubted, do any other selection guidelines. Nor should this Court make such a distinction.

It stands to reason that a school board which may eliminate the subject of higher mathematics or astronomy, or biology from its curriculum. (*Epperson v. Arkansas*, 393 U.S. 97 at 111, Black, J., concurring); may eliminate Contemporary Poetry as a course, (*Cary*, supra, (at 544)); may forbid instruction on the subject of birth control (*Mercer v. Michigan State Board of Education*, supra); may decide that the only foreign language to be taught in

its schools shall be Spanish (by analogy to the state power posited by Justice Stewart concurring in *Epperson*, supra (at 116)), or may decide whether to have a library at all (*Right to Read*, supra at 711) should not only have the admitted power to decline to select a volume *for* a library shelf for reasons "related solely to the social or political tastes of school board members" (*Minarcini*, supra, at 582), but should be permitted to take one *from* a library shelf for the same reasons.

c. The board's actions were not in furtherance of the suppression of ideas or otherwise unconstitutionally motivated.

Petitioner board members are unashamedly and unabashedly conservative in the traditional and generic sense of the word. They apply their conservative principles in the exercise of their duties as school board members in matters such as the hiring of a Superintendent, the establishment of a traditional K-8 grade organization, the formation of an ROTC unit in the schools (one of the only ones in the county), the establishment of curriculum, teacher negotiations and fiscal matters are decided on the basis of conservative principles. (J.A. 21, Ahrens dep. at 83, 84). They are "conservative" in their personal lives also and believe strongly in the traditional values. (Martin dep. pp. 24-25).

It is readily conceded that were the board to take actions such as those complained of in an effort to "aid or oppose" a particular religion, to prohibit the teaching of a "theory which is deemed antagonistic to a particular dogma" or to prohibit a teacher from mentioning "the very existence of an entire system of respected human thought" (*Epperson*, supra, at 106, 107, 116) its actions might be set aside. But this is not what Petitioner board has attempted and the record is crystal clear on this point. Not only have Respondent students not refuted any of the materials appended to the board's motion for summary judgment as required by Rule

56 (e), F.R. Civ. P., one of which was an affidavit by Superintendent Oglesby stating

> That the teaching staff is not now nor has it been to my knowledge prohibited directly or indirectly from explaining or teaching about any of the "banned" books nor from discussing them or the ideas they express in any manner. (J.A. 121)..

but they have unqualifiedly agreed pursuant to Local Rule 9 (g) that there has been no attempt to suppress the teaching of any of the doctrines, theories or ideas addressed by the proscribed materials (See Statement of The Case, p. J.A.-4). The board has not substituted rigid, exclusive indoctrination for their lawful prerogatives (*Zykan*, supra, 631 F. 2d. at 1306). (See also dissent of Mansfield, J. in court below, 638 F. 2d at 428).

The only factor other than an attempt at suppression of ideas that the court below considered as tainting the board's action was that of political motivation which was deemed the proper subject of trial inquiry by Judge Newman who concurred in the result (638 F. 2d. at 438).

Not only is "political" an "amorphous" term, but it is one which, if the basic nature of the nation's public schools and their operation as well as their proper role in inculcating community and national values is realized, is essential in any consideration of a school board's inherent function. This was understood by the U.S. Supreme Court when, in *Epperson*, supra, (at 113, 114) Mr. Justice Black concurring, implied that a teacher had no "right to teach sociological, economic, *political*, or religious subjects that the school's managers do not want discussed." (emphasis provided). The seventh Circuit has been even more explicit in the recognition of the inseparability of "politics" and the transmission of values by the nation's public schools. (*Zykan*, 631 F. 2d at 1305)

(See also *Ambach v. Norwick*, 441 U.S. 68 at 79, f.n. 9; Kay, V.O., *Public Opinion and American Democracy* (1961) at 316, 317; Cahill, R.S., *The Politics of Education in the Local Community* (1964) (at 36).

Even were "political" motivation impermissible constitutionally and even were Petitioners to have been "politically" motivated their actions would still pass constitutional scrutiny since a mixture of permissible and impermissable motivation does not vitiate an action. Although Judge Newman in concurring in the court below stated he felt the ruling regarding motivation in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) was inapposite (at 437, 438) it is submitted this is not the case. Mr. Doyle had no tenure, nor does a library book. There was no state-law requirement of "reasons" or "cause" to be given Mr. Doyle, nor is there one for a library book. Mr. Doyle had no "right" to receive the job in the first place, nor can a board be prevented from not placing a book on the shelves. By analogy a book which was obsolescent (which all will agree can be removed from a shelf at any time without fear of protracted litigation), but also objectionable for impermissible reasons might have its shelf life extended until a board was elected which complained solely of its obsolescence. The practical difficulty of ascertaining motivation and the Court's historical refusal to invalidate statutes because of improper motives was commented on in *Epperson*, supra, at 113 (Justice Black concurring) following his statement supporting the power of the state to withdraw from the curriculum "any subject deemed too emotional and controversial for its public schools." It is submitted that if whole subjects can be removed from a curriculum because of controversiality without investigation of motives certainly a "controversial" book may be.

d. The test of the constitutionality of the board's actions is not that of compliance with narrow and specifically defined regulatory criteria.

Although the majority opinion of the court below appears to mandate a decision against the board were it not to have followed narrowly and specifically drawn regulatory criteria (638 F. 2d at 416, 417) an examination of pertinent authority indicates such not to be required. Such a statement may have resulted from a presumption of similarity of the actions by Petitioners and those of a board attempting to "censor" a student publication. It is important, however, to realize that in the one case there is a pure form of third party expression involved while here it is extremely limited expression, if any.

It is submitted that the adoption of regulations which must of need take into consideration all of the conflicting constitutional, sociological and political imperatives appertaining to issues of this nature would be almost impossible. Such regulations would be a spawning ground for much litigation of the type attempted to be avoided here. The case against narrowly drawn and specific criteria has been aptly stated by the First Circuit in *Advocates for the Arts v. Thompson*, 532 F. 2d 792 where (at 797) it was stated (regarding a vulgar poem) that

> In the absence of ascertainable principles by which to define artistic merit, we see no reason to demand that official discretion in this area be hedged by "narrow, objective and definite standards"* *Shuttleworth v. City of Birmingham.*

*See comments by Goldstein, S., *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, U. of Pa. L. Rev. 124: 1293, at 1331 and f.n. 123 suggesting no preexisting standards required for constitutional removal of teachers for the teaching of offensive materials.

There are numerous tests that can be applied to ascertain the constitutionality of Petitioners' actions. They are of varying degrees of strictness. One general rule is that "As conduct becomes less and less like 'pure speech' the showing of governmental interest required for its regulation is progressively lessened" (citing law review articles) (*East Hartford*, supra 562 F. 2d. 838 at 858). Not only does the lack of "purity" of the speech of the student plaintiffs mitigate against them, but their age does also. In *Zykan*, supra, at 1306, student challenges of decisions by local educational authorities were held to require crossing "a relatively high threshold before entering upon the field of a constitutional claim suitable for federal court litigation." The governmental interest required has variously been held to be a "compelling state interest" (*Roe v. Wade*, 410 U.S. 113 (1973) at 178); a substantial state interest or merely "a legitimate state interest" (*Ambach v. Norwick*, 441 U.S. 68 (1979) at 59). That a state interest exists in regulating the availability of vulgar and indecent materials where juveniles are involved (*Pacifica*, supra,) or in transmitting community values to public school children is without question. Whether the interest is "compelling", "substantial" or merely "legitimate" is a matter of subjective judgment.

It is suggested that, rather than ascertain the precise nature of the interest to be protected, the Court balance the conflicting interests at stake in arriving at its decision. The interests in conflict are, on the one hand, the right (and duty) of a school board to transmit community values to those in its charge coupled with its statutory mandate, the obvious state interest in limiting the availability of vulgar materials to juveniles and the firm caveat of this Court in *Epperson*, supra, that the courts not intervene in the "resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values" (at 104) and, on the other hand, the limited and reciprocal "right" of expression of a secondary school student. This "balancing test" has received full acceptance,

especially in public school matters involving claims of freedom of speech, and is the more logical in the present instance. (*American Communications Ass'n. CIO v. Douds*, 339 U.S. 382 (1950); *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 284 (1977).* When such a test is applied to the case at bar the Petitioner school board cannot fail to prevail.

CONCLUSION

The judgment of the Court of Appeals, insofar as it reversed the summary judgment awarded petitioner, should be reversed.

Respectfully Submitted,

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*Any suggestion that the "substantial disruption" test of *Tinker v. Des Moines*, supra, should apply (see F.N. 9 of Newman concurrance in court below) is rejected by the Second Circuit in *Thomas*, supra, 607 F. 2d at 1055, 1057. See also Georgetown L.J. Content Regulation and the *First Amendment: A Revisionist View*, 68:727, 739-747 (1980).

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 80-2043

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT, NO. 26, et al.,

Petitioners,

—v.—

STEVEN A. PICO, by his next friend, FRANCES PICO, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-2043

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT, NO. 26, et al.,

Petitioners,

—v.—

STEVEN A. PICO, by his next friend, FRANCES PICO, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF

STATEMENT OF THE CASE

Sequence of Events

In September 1975, three members of the Board of Education of the Island Trees Union Free School District, including the Board's President, Richard Ahrens, and Vice-President, Frank Martin, attended a conference in Watkins Glen, New York, sponsored by a "conservative" (J.A. 21)[1] parents group called Parents of New York United ("PONY-U").

At the Watkins Glen conference, Mr. Martin and Mr. Ahrens obtained a list of "objectionable" (J.A. 22) books together

1 Parenthetical references to "J.A." refer to the Joint Appendix filed with the Court along with Petitioners' Brief.

with a series of excerpts from these books. Interspersed with the excerpts were editorial comments about the books and their authors.[2] There was, however, no discussion of the particular books at the conference and they learned nothing else about the books except for that which appeared in the excerpts and editorial comments. (Ahrens Dep. at 21-22)[3]

Later that fall, Ahrens and Martin examined the card catalogue of the Island Trees High School library and eventually determined that nine of the "objectionable" books were in the library: *The Fixer,* by Bernard Malamud; *Slaughterhouse Five,* by Kurt Vonnegut; *The Naked Ape,* by Desmond Morris; *Down These Mean Streets,* by Piri Thomas; *Best Short Stories by Negro Writers,* edited by Langston Hughes; *Go Ask Alice* (anon.); *A Hero Ain't Nothing But A Sandwich,* by Alice Childress; *Black Boy,* by Richard Wright; *Laughing Boy,* by Oliver LaFarge; and *Soul on Ice,* by Eldridge Cleaver. They found one, an anthology entitled *A Reader For Writers,* edited by Jerome Archer, in the Junior High School library, and also discovered that *The Fixer,* was used as a reading in a high school literature course. Ahrens and Martin looked for no other "objectionable" books except those on the PONY-U list. (J.A. 129-130)

In March 1976, at the request of Ahrens, the Superintendent directed the removal of the books from the library shelves. On March 19, the Board issued a press release in an effort to justify its book removal decision. The Board explained that Ahrens and Martin had attended the PONY-U conference, where they learned of books "found in schools throughout the country which were anti-American, anti-Christian, anti-Semitic, and just plain filthy." (J.A. 8) The Board further

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2 The leaflets containing the list of objectionable books, together with the excerpts and the editorial comments, are set forth at J.A. 30-42.

3 Parenthetical references to "Ahrens Dep." and "Martin Dep." refer to transcripts of depositions of these two defendants taken in November 1977. The depositions have been made part of the record in this case.

explained that they found that nine "of these objectionable books were in [the Island Trees High School] library." (J.A. 9)

The matter was publicly aired at an open meeting of the Board on March 30. The Superintendent of the School District, Richard Morrow, criticized the Board for removing the books on the basis of a list prepared by outsiders and for by-passing established procedures for handling such matters. He recommended that the books be returned to the shelves pending appropriate review. Instead, the Board reaffirmed its earlier decision to remove the books. It did, however, establish a book review committee to read the books and to recommend whether or not the books should be banned. (J.A. 60)

On July 1, 1976, the committee submitted its report to the Board recommending restoration of five books and removal of three. There was a tie vote on two books and no recommendation was made on one, *A Reader for Writers,* because Committee members had not had an opportunity to read it. (J.A. 67)

On July 28, 1976, the Board enacted resolutions that "removed from elementary and secondary libraries and for use in the curriculum" nine of the books. The Board restored *Laughing Boy* without restriction and restored *Black Boy* "on a restricted basis." (J.A. 75-79) It was the first time the Island Trees School Board had ever taken such action. (Ahrens Dep. at 12)

Reasons for the Ban

The reasons given by defendants for banning the books are contained in the March 19 press release, in numerous statements made by Ahrens and Martin both before and in the course of this litigation, and in an affidavit submitted by the other members of the Board. (J.A. 119-120) Several pertinent facts emerge from those documents.

First, the defendant's objections to the books are limited to excerpts. Despite the Superintendent's caution that "[m]any books—among them widely acclaimed classics—contain brief passages which, if taken out of context, would seem to con-

demn them," (J.A. 55-56), defendants have made no effort to formulate an objection to any book taken as a whole. Indeed, defendants removed some books even though they believed that those books, taken as a whole, were not objectionable. (J.A. 130)[4]

Second, the ban was imposed without any professional confirmation of the board members' judgments of the books. Although a book review committee was convened, which reviewed the books for two months, members of the board never discussed the books with the committee, received no explanation of its deliberations, and ultimately ignored its recommendations. (J.A. 129) Neither librarians employed by the district, nor teachers, nor outside experts were consulted by the board members, nor did the Board consult publications which rate books for school libraries. (J.A. 128-129) If the Board had done so, they would have found that every book except *A Reader for Writers* was recommended as educationally suitable for high school students.[5]

Third, the ban was absolute. No book could be used for any course, either as required or optional reading. Although the ban did not preclude discussion about the themes of the books, the books themselves could not be used in the discussion (J.A. at 131), nor were teachers permitted to suggest that students read the books in order to prepare for any such discussion. (Ahrens Dep. at 24, 57-58)

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4 The defendants removed some books because of excerpts deemed offensive to religious, racial or ethnic groups, though they understood that the excerpts might not "reflect the thematic point of view of the entire book to that racial, religious or ethnic group." (J.A. 130)

5 *A Reader for Writers* was not evaluated. The others were recommended for use by periodicals such as *Library Journal, School Library Journal,* and *Booklist.* The appendix to the *amicus* brief filed by the Association of American Publishers and other organizations contains references to these reviews as well as to the numerous prizes and awards that have been bestowed upon these books.

Fourth, despite the defendants' oft-stated objection to the books' profanities and sexual explicitness, they never sought to determine whether any other books in the school libraries were similarly objectionable. (J.A. 129-130) The inference, that they were concerned more about ideas than words or sex, is borne out by the record. For example, in *A Hero Ain't Nothing But A Sandwich,* Nigeria Greene, a black teacher in a black public school, calls her students attention to the fact that George Washington was a slave owner. She tells the reader her thoughts about the irony of this hero's place in her curriculum. The Board's conclusion that her thoughts were anti-American was one of the reasons for banning the book. (Martin Dep. at 20-23; Ahrens Dep. at 89)

The leaflet that Martin and Ahrens received at the PONY-U conference says even more about the political ideas that precipitated this book ban. Eldridge Cleaver, whose *Soul on Ice* was listed as "objectionable," was described as a "Leader of Black panther [sic] and not allowed to live in America." "The book," the leaflet says, "is full of anti-American material." (J.A. 30) The leaflet criticized *A Reader for Writers* because an essay in the volume "equates Malcolm X, considered by many to be a traitor to this country, with the founding fathers of our country." (J.A. 39)[6]

Religious ideas also prompted the ban. The March 1976 press release stated that some of the books were "anti-Christian" and "anti-Semitic." (J.A. 8) Similar views were expressed in the course of the litigation. Ahrens conceded that, although *The Fixer,* taken as a whole, was sympathetic to the plight of Jews during a period of persecution in Russia, the book was

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6 The edition of *A Reader for Writers* that the defendants found in the library did not have the Malcolm X selection, so defendants justified banning the book because it contained Jonathan Swift's widely acclaimed essay "A Modest Proposal." Defendants objected that eating babies, Swift's bitterly ironic solution to the over-population and hunger problems in Ireland, had no relevance to the curriculum. (Ahrens Dep. at 48-49, 93, 94; Martin Dep. at 14-15.)

banned because he thought that some passages might be objectionable to Jews. (Ahrens Dep. at 88) As for *Slaughterhouse Five,* defendant Martin referred to it as ". . . blasphemous and anti-Christian. No one could think otherwise" (J.A. at 103), while the PONY-U leaflet, in boldface letters, called attention to a lengthy passage that contains no vulgar words, but which suggests that Christ was crucified because he was a "nobody". (J.A. 34-35)

In sum, the school board concluded that these books were objectionable because they projected values and portrayed viewpoints that were antithetical to the values and beliefs of the school officials. From the time that the school board members first learned of these books at the PONY-U conference through the events which culminated in the removal of these books from the Island Trees school libraries, defendants evinced a consistent desire to exclude ideas, thoughts and values that were un-American, anti-Christian, anti-Semitic and generally disagreeable.

Procedural History

This case was initiated in January 1977 when plaintiffs filed an action in New York State Supreme Court, Nassau County, challenging the book removal decision of the Island Trees school board. The suit was brought as a class action on behalf of all junior and senior high school students in the district alleging a violation of the students' federal and state constitutional rights as well as a denial of the guarantees of 42 U.S.C. § 1983. In addition to their own First Amendment rights, the plaintiffs also asserted the rights of librarians and teachers within the district to academic freedom in the selection and utilization of educational materials. Declaratory and injunctive relief was sought to the end of returning the books to the Island Trees library and permitting their use in the curriculum.

Defendants removed the action to federal court, and plaintiffs' motion to remand to state court was denied. Plaintiffs

then moved to certify the case as a class-action. Subsequently, the parties cross-moved for summary judgment.

In a decision dated August 5, 1979, the district judge denied class certification, denied the students standing to assert the rights of librarians and teachers, and granted defendants' motion for summary judgment.

An appeal was taken to the Court of Appeals for the Second Circuit, which reversed the judgment of the District Court and remanded the matter for trial. Writing for the Court of Appeals, Judge Sifton was of the view that the judgment of the District Court should be reversed and that plaintiffs were entitled to summary judgment without the necessity of a remand for additional fact-findings. Judge Newman joined Judge Sifton in the view that a reversal of the lower court opinion was appropriate. He believed, however, that the present record was insufficient to entitle plaintiffs to judgment in their favor and that a remand to the trial court was necessary to develop a plenary record on which the issues in this case might appropriately be determined. Judge Mansfield dissented from the decision to reverse.

The defendants' petitions for rehearing and rehearing *en banc* were denied by the Court of Appeals on March 3, 1981. Defendants' petition to this Court for a writ of certiorari was granted on October 13, 1981.

SUMMARY OF ARGUMENT

This controversy involves the constitutionality of a decision by a local school board to remove several books from a high school library, one book from a junior high school library, and to prohibit the use of any of them in the curriculum. The books have been widely praised and have won numerous literary prizes and awards. They have also been recommended for adolescent readers by various professional rating services. Nevertheless, the books were physically removed and banned because they contained passages that members of the school

board found "inconsistent with the basic values of the community that elected them." *Pico* v. *Board of Education,* 474 F. Supp. 387, 397 (E.D.N.Y. 1979).

Thus, at bottom the clash between the school board and the students in this case is a classic First Amendment confrontation between a transient majority that seeks to deploy the force of government to censor unpopular expression and those who seek to express—or be exposed to—differing perspectives.

Traditional First Amendment "neutrality" principles prohibit the state from engaging in content-based distinctions regarding expression and from promoting a favored set of values. *Police Dept. of the City of Chicago v. Mosley,* 408 U.S. 92 (1972). But public school officials are required to make content-based judgments and are expected to promote societal values. As noted by the Court of Appeals, "the application of the prohibitions of the First Amendment to secondary school education presents complexities not encountered in other areas of government activity." 638 F. 2d at 412.

While recognizing the historic inculcative function of public education, this Court has, at the same time, been careful to point out that the authority of the state and of school boards, in these respects, is not unlimited. In a line of cases ranging from *Meyer v. Nebraska,* 262 U.S. 390 (1923) to *Tinker v. Des Moines Independent School District,* 393 U.S. 503 (1969), this Court has grappled with the tension between the First Amendment's commitment to the heterogeneity of ideas and the existence of a public education system with the capacity to inculcate societal values. In resolving that tension, this Court has insisted that, whatever may be the inculcative authority of the state or of the local school boards, "the First Amendment . . . does not tolerate laws [or policies] that cast a pall of orthodoxy over the classroom." *Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967). In its insistence that school authorities respect diversity, the First Amendment comports with sound democratic principles regarding the role of public education. Both the First Amendment as well as democratic

precepts command a commitment to the diversity of values and beliefs.

This doctrinal tradition has forceful application to the instant controversy. For it remains apparent from what these school officials said and did that the actions of the Island Trees school board grew out of a desire to impose an orthodoxy of values and beliefs. The school board's assertion that the banning of books with offensive and ungrammatical language was necessary to facilitate the teaching of proper language and grammar is a *post hoc* rationalization which is wholly unsubstantiated by any connection with established pedagogical principles. Moreover, in the present controversy, ideas and language are so inextricably bound together that it is impossible to separate the school board's putative concerns about language from their predominant ideological concerns.

There is also a second doctrinal tradition that is applicable to the case at bar. That doctrine mandates that, "[p]recision of regulation must be the touchstone" where First Amendment interests are at stake. *N.A.A.C.P. v. Button,* 371 U.S. 415, 438 (1963). This Court has repeatedly observed that, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.* at 433. These concepts have given rise to a "First Amendment due process" doctrine requiring that precise substantive criteria and regularized procedural mechanisms be employed by a governmental entity that seeks to censor expression. *Shuttlesworth* v. *Birmingham,* 394 U.S. 147 (1969). Writing for the Court below, Judge Sifton noted "the erratic, arbitrary and free-wheeling manner in which the defendant school officials proceeded in this case." 638 F. 2d at 416. Such arbitrary and free-wheeling behavior plainly violates "First Amendment due process" principles.

ARGUMENT

I.

THE ISLAND TREES SCHOOL BOARD VIOLATED THE FIRST AMENDMENT BY PROHIBITING THE USE OF BOOKS BECAUSE THEY EXPRESSED IDEAS AND VALUES OF WHICH THE BOARD MEMBERS DISAPPROVED.

Introduction

The central theme of the First Amendment is its commitment to a diversity of ideas. Because of that commitment, the First Amendment typically demands that government maintain strict neutrality towards the content of speech.

When people seek to use streets or parks or other public places in order to express their views, the state is powerless to make content-based judgments favoring popular speakers over unpopular ones or good ideas over bad ones. *Police Department v. Mosley,* 408 U.S. 92 (1972). No speech—whether a march, a rally, a film or a book—can be prohibited merely because the state disapproves of the views it expresses. Thus, if the state were to ban the sale of any of these books for the reasons given by the Island Trees School Board, the ban would be patently unconstitutional.

The present controversy is complicated by the fact that it takes place in an institution—the public schools—where content-based judgments about books and ideas are unavoidable and where one of the recognized institutional goals is the transmittal of certain societal values. Nevertheless, in these matters, as in all other matters relating to speech and expression within the schoolhouse, school officials are prevented by the First Amendment from eliminating disfavored ideas or values. It is a constraint which, as we shall see, has been repeatedly emphasized by this Court.

A. The First Amendment bars official conduct designed to impose orthodoxy within the schoolhouse.

For over fifty years, this Court and the lower federal courts have struggled with the tension between the nation's commitment to the heterogeneity of ideas—a commitment commanded both by the First Amendment and sound democratic precepts—and the existence of a public education system with the capacity to transmit societal values.

In resolving that tension, the guiding principle has been this Court's pronouncement that "the First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian v. Board of Regents*, 385 U.S. 589, 603, (1967). However, *Keyishian* was not the first time the Court had articulated that principle.

In *Meyer v. Nebraska*, 262 U.S. 390 (1923) the Court had before it a Nebraska statute that prohibited the teaching of any foreign language in any school below the ninth grade. The goal of the legislation was "to promote civic development . . . ." *Id.* at 401. The Court agreed that "the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally . . . ." *Ibid.* It said that "[t]he desire of the legislature to foster a homogeneous people with American ideals, prepared readily to understand current discussions of civic matters, is easy to appreciate." *Id.* at 402. Nevertheless, "the individual has certain fundamental rights which must be respected." *Id.* at 401. The state's civic goal was unassailable but a "desirable end cannot be promoted by prohibited means." *Ibid.*

While conceding the right of the state "to make reasonable regulations for all schools . . . or to prescribe a curriculum for institutions which it supports," *id.* at 402, the Court held that the proscription of "knowledge by a child of some language other than English . . . is arbitrary, and without reasonable relation to any end within the competency of the state." *Id.* at 403.

In *Meyer,* the Court first began to explore the limits upon the power of a transient political majority to transmit only homogeneous values. The Court took up these issues once again in the flag salute cases. There the state's case was presented even more compellingly; the country was at war and patriotic rituals such as flag salutes were said to be essential to national survival. For a time, the argument prevailed. In *Minersville School District v. Gobitis,* 310 U.S. 586 (1940), the state's right to promote the values of the society, to encourage "a common feeling for the common country," *id.* at 598, legitimized the compulsory flag salute. Those who, by their nonparticipation, sought to express values opposed to the values represented by the flag salute, could be excluded from school.

When the Court reconsidered the compulsory flag salute, the power of the state to encourage allegiance to its values and precepts remained unquestioned. "National unity as an end which officials may foster by persuasion and example is not in question." *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 640 (1943). Rather, at issue was whether that end could be pursued by eliminating dissenting values. In holding that it could not, the Court did so "with no fear that the freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization." *Id.* at 641.

In *Keyishian v. Board of Regents, supra,* the Court invalidated a New York statutory scheme designed to prevent "subversives" from teaching in public schools and universities. While recognizing that the classroom is a proper place for inculcating values, the First Amendment imposed upon the courts an obligation to preserve heterogeneity within the schools. The Court declared:

> "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." . . . The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of

> ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection. . . ."

385 U.S. at 603.

The Court returned to this theme in *Epperson v. Arkansas*, 393 U.S. 97 (1968) and *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969). Although *Epperson* specifically relied upon the First Amendment's protection of religious freedom, the decision again exhibited the Court's hostility to the imposition of orthodoxy within the classroom. And in *Tinker*, the Court, quoting *Meyer*, once again rejected "the principle that a State might so conduct its schools as to 'foster a homogeneous people.' " 393 U.S. at 511.

Many cases in the lower federal courts have had occasion to affirm that principle. A decision of the Second Circuit is illustrative. In *James v. Board of Education*, 461 F.2d 566 (2d Cir. 1972), the Court analyzed a school board's power to prohibit a teacher from wearing a black armband. Public schools may, the court held, inculcate community values but it warned against granting school boards "unrestrained discretion," lest they "permit prejudices of the community to prevail. It is in such a situation that the will of the transient majority can prove devastating to freedom of expression." *Id.* at 575.

Judge Newman, in his opinion below, emphasized the limits of the inculcative function within public schools. He noted that, although the *James* opinion seemed to accept the authority of a school to "introdoctrinate," the use of that phrase was

> simply intended to describe the school's role in transmitting values . . . *James* pointedly condemns "indoctrination" in the sense of endeavoring to insist that one set of values must be accepted by the students . . . There is no suggestion in *James*, or in any other federal case, that the power of school officials extends beyond curriculum control to the suppression of ideas.

638 F. 2d at 432-33 n.1.

Petitioners attempt to avoid the *Meyer-Tinker-James* line of authority by relying on the tradition of local community control of education. But their exclusive emphasis on the values of the Island Trees community ignores their obligation to prepare students for the world beyond Island Trees.

The goal of public education in a democracy is the preparation of citizens capable of functioning in a complex, pluralistic society.[7] Although we have chosen to place control of public education in the hands of local communities, they retain an obligation to inculcate the pluralistic values of the society at large. When school boards seek to capture the educational process, not to advance the ends of pluralistic education, but to propagate their exclusive vision of the world, "they threaten the very process they are designed to foster." 638 F. 2d at 435 (Newman, J., concurring).[8]

The concern that transient majorities will use the public education system to exclude ideas and values other than those presently in political favor is one that the Court has repeatedly expressed in the school cases since *Meyer.* Whether the current orthodoxy is religious, as in *Epperson,* cultural, as in *Meyer,* or political, as in *Keyishian, Barnette,* and *Tinker,* this Court has consistently invoked both the First Amendment as well as its sense of the proper role of public education in a democratic society to limit the power of the state to inculcate exclusively majoritarian values.

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7 See Getzels, "The Communities of Education" in Leichter (ed.) *Families and Communities as Educators* (1979).

8 The compulsory nature of our public education system heightens the obligation of public educators to respect diversity. Serious concerns must necessarily be raised about a society that compels children to attend schools when those schools are transmitting exclusively sectarian values. These concerns would not be alleviated by the fact that the sectarian values might be shared by a transient majority of the people within a particular community. Respect for individual differences among people demands of public educational institutions, that compel attendance by force of law, a toleration for diversity of viewpoints and values. See Judge Newman's concurring opinion below, 638 F.2d at 433.

Both the First Amendment and democratic principles, however, still leave school officials with considerable discretion. The Island Trees schools may teach about the values of the Island Trees community. Teachers may encourage respect for those values; school officials may promote those values. What they cannot do is to foster community values and ideas by excluding or eliminating conflicting viewpoints.

B. A school board may not adopt a policy with respect to the removal of books from a library where that policy is plainly designed to impose orthodoxy within the schoolhouse.

As demonstrated above, there is a firm tradition within our First Amendment jurisprudence which holds that school officials cannot advance sectarian or even majoritarian interests to the point of imposing an orthodoxy of ideas or viewpoints within the schoolhouse. There remains the question of how this tradition applies, generally, to the processes of book selection and book removal, and, specifically, to the facts of this case.

School officials, of course, regularly make content-based judgments concerning the curriculum, judgments that are inevitably informed by their own values and, perhaps, the values of their community. Nothing in the First Amendment requires that school officials make curricular or book acquisition decisions without reference to those values. Nor does it forbid school officials from affirmatively emphasizing certain values as part of the school system's inculcative function. However, when school officials use their authority, even with respect to curricular and book decisions, to exclude unpopular viewpoints and values, then the teaching of *Meyer, Barnette, Epperson, Keyishian,* and *Tinker* is that First Amendment guarantees are violated.

The concern exhibited in those cases that the schoolhouse be a "marketplace of ideas" inevitably extends to actions that seek to eliminate dissenting values from the curriculum. If, as those cases say, the First Amendment proscribes the imposition of "orthodoxy," then it surely applies to that aspect of the

schoolhouse which, if unrestrained by constitutional principles, offers the most potential for imposing orthodoxy. If, as *Keyishian* says, "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues,' " 385 U.S. at 603, surely the nation's future is more jeopardized by the removal from a curriculum of books that express values deemed offensive to a local community than by a loyalty oath. If the First Amendment proscribes one, it proscribes the other.

The logic of the decisions permits no other conclusion. This Court's opinions in *Tinker,* holding that school boards may not punish students or teachers who express unpopular views, did not mean to leave those school boards free to prohibit the use of books that express unpopular views. If the school board may not ban anti-war symbols, by what conceivable logic would it have the right to ban anti-war books? Or anti-American or anti-Christian books? To Judge Newman, concurring below, banning books for such reasons conveys "the message that some idea or viewpoint is not merely unsound, but is not acceptable to be aired within the school community." 638 F.2d at 433. The First Amendment will not permit school boards to convey that message.

Often, of course, the intent to impose orthodoxy will not be clear. Practical limitations of time, shelf space, money and class hours mean that not every book can be bought and not every idea can be taught. Even when an impermissible motive has influenced the process of selecting books or courses, those decisions involve so many other factors that the impermissible motive will not be easily isolated and judicial intervention will be rare.[9] As a practical matter, school officials are and will continue to be given wide latitude to make affirmative judgments about what books to buy and what to teach.

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9 However, had defendants declared that they would buy no more books that are inconsistent with the values of a majority of school board members, the First Amendment would plainly be violated and judicial intervention would be appropriate, even in the book acquisition situation.

But the situation is entirely different where school officials are engaged in negative curricular decisions, as in *Meyer* or *Epperson,* or where books are banned from a school district, as in the case at bar. This is particularly true with regard to removal from a library of books that have already been purchased and shelved.[10] As Judge Newman observed, "there are few legitimate reasons why a book, once acquired, should be removed from a library not filled to capacity." 638 F. 2d at 436. And, indeed, no legitimate justifications appear here. Nor do any legitimate reasons explain the decision to bar the use of these books in the curriculum.

Both from what the defendants said as well as what they did, it is evident that neither evaluations of competing instructional materials nor considerations of limited class time, money or space prompted the prohibition. Rather defendants' own words confirm that, in fact, their actions, both with respect to the curriculum and the library, grew out of a desire to impose an orthodoxy of values and beliefs.

The members of the Island Trees school board have repeatedly acknowledged that the books were banned because it was decided that they were inconsistent with the conservative values of the community. Once that decision was made, defendants viewed their obligation to be clear: "The majority of

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10 The general claim that school officials cannot impose orthodoxy within the schoolhouse acquires a special poignancy when applied to decisions to remove books from a library. For the library serves a somewhat different educative function than does the classroom. In the classroom, curricular choices are made, substantive areas emphasized, explicit value judgments are discussed and some inculcation of values takes place. On the other hand, the library functions as the repository for a broad array of information, viewpoints and values that are neither discussed nor emphasized within the classroom. The library plays a critical role as the student's window to worlds beyond his or her own. As the Sixth Circuit pointed out in *Minarcini* v. *Strongville City School District,* 541 F.2d 577, 582 (6th Cir. 1976), "[a] library is a mighty resource in the free marketplace of ideas." Thus, the library serves as the single institution within the schoolhouse where the First Amendment interest in heterogeneity is most profound and the government's inculcative interest is weakest.

residents in Island Trees do *not* want these books in their schools—the majority rules." (J.A. 109-110) Other statements throughout the controversy demonstrate defendants' preoccupation with excluding unorthodox ideas from the Island Trees schools. Thus, there is frequent reference to "anti-American" authors and excerpts. The author of *Soul on Ice,* one of the banned books, is described as a leader of the Black Panthers. It is said about *A Reader for Writers* that it makes a flattering reference to Malcolm X.[11] Defendants' press releases and depositions continue that theme.

Similarly, defendants express concern about anti-religious passages in the books. Both *The Fixer* and *Slaughterhouse Five* are condemned because they contain passages that are, respectively, anti-semitic and anti-religious.

Then there is the offense that two board members took to the observation by Nigeria Greene, a character in *A Hero Ain't Nothing But a Sandwich,* that George Washington was a slaveholder. They banned the book partly for that reason and now insist that this Court must endorse their action because a majority of their constituents voted in support of such a judgment. If the First Amendment means anything, it means that no agency of the state, least of all one charged with the duty to educate, may prevent students from reading a book because it mentions an unpleasant historical fact.

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11 *A Reader for Writers* is a collection of more than 80 essays and pieces of fiction. Defendants say that it was banned because of a single selection, Jonathan Swift's classic essay, "A Modest Proposal." In the essay, Swift ironically advocated eating babies, a subject that the Board considered irrelevant to the curriculum. Assuming that defendants believed that eating babies, and even irony, were irrelevant to all aspects of a high school curriculum, still it seems unlikely that they banned the book for that reason. Since no one was compelled to read the Swift essay, it would be logical to remove the book from the library only if all of the other essays were irrelevant. Defendants do not pretend to have made that judgment. Given the roster of authors in the book and the obvious relevance of some of their essays to a school curriculum (J.A. 132 to 137), one is left with the suspicion that the ban of this book had mostly to do with the remarks in the PONY-U leaflet about Malcolm X. (J.A. 39)

Since the commencement of the litigation, defendants—perhaps with applicable constitutional principles in mind—have attempted to minimize the role that such ideologically based judgments played in their decision to ban the books. Nevertheless, the fact that the books were initially removed without knowing anything more about them than was said on the PONY-U material lends support to the inference that the political, moral and religious judgments made by the organizers of the PONY-U conference have supported this ban from beginning to end.

Defendants' actions speak as pointedly as do their words. They lead to the same conclusion that no purpose other than the imposition of orthodoxy prompted defendants' actions. The record is barren of evidence that any legitimate educational purpose was even considered. Instead of the routine process of approving and disapproving proposed curricular materials, defendants undertook, in the words of the court below, "an unusual and irregular intervention," 638 F.2d at 414, in the curricular process. The books at issue were not presented to the school board by staff members seeking approval for a given course. Rather, the board learned of the books because they had been deemed "objectionable" by an organization with a particular social and political ideology. In making its decision, the board read no reviews of the books, they consulted none of the services that evaluate books for school use and sought no advice from school professionals. Indeed, they disregarded the recommendations of the "impartial", "representative" committee that they appointed to study the books. Moreover, the board's action was not merely to reject the "objectionable" books in favor of others that were more suitable, but to impose an absolute ban on the use of those books in any course in the curriculum, an action that the school board had never taken before.

In sum, the Board's statements and actions provide ample, undisputed evidence in support of the conclusion that defendants sought to remove books that portrayed viewpoints and projected values that were antithetical to the ideology shared

by a majority of the Island Trees residents. Upon such a conclusion, plaintiffs are entitled to summary judgment restoring the instant books to the school libraries and curriculum. However, if for some reason such a conclusion cannot reasonably be inferred from the evidence thus far adduced, plaintiffs should be permitted to proceed to trial in order to more fully explore the precise contours and texture of the "pall of orthodoxy" that the Island Trees school officials sought to impose.

C. Where, as here, the impermissible intent to impose orthodoxy is plain, the federal judiciary has an obligation to exercise its authority for the protection of basic First Amendment values.

In *Epperson* v. *Arkansas, supra,* at 104 the Supreme Court counseled that, "[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint." Yet, *Epperson's* familiar caution of judicial self-restraint is qualified. Although broad powers are afforded local school boards, the courts

> have not failed to apply the First Amendment mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief.

393 U.S. at 104.

Of course, in *Epperson* itself, the Court did intervene with respect to a curriculum decision made in the first instance by Arkansas officials. And in *Meyer, Barnette, Keyishian* and *Tinker* decisions by school officials similarly required judicial intervention. As pointed out above, the lesson of these cases is that the federal courts must and will intervene in order to prevent school officials from imposing the orthodoxy of majoritarianism within the classroom.

To the extent that our system of public education may be built upon a delicate balance between the majoritarian interest

in promoting societal values and the First Amendment prohibition against orthodoxy, the cases, cited above, also demonstrate that courts must occasionally intervene to insure that the delicate balance is preserved. The impulse toward majoritarian values is a strong one and, by definition, it will ordinarily prevail in the political process. Thus, while the Court has recognized the danger in establishing itself as "the school board for the country," *Minersville School District* v. *Gobitis, supra* at 598, it has recognized the greater danger in consigning such controversies to the polling place:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia State Board of Education v. *Barnette, supra* at 638.

In the present case, where the school officials plainly attempted to impose an orthodoxy of values within the Island Trees schoolhouse, the federal judiciary has an obligation to exercise its authority for the protection of basic First Amendment values. The resolution of this controversy, no less than the flag salute controversy, cannot depend on the outcome of an election. There is no more certain prescription for the destruction of our public schools than the prospect of school board candidates standing for election on the basis of which books they will ban from or restore to the schools.

When school officials proscribe books because they express unpopular ideas, First Amendment rights are at stake and their vindication is the singular obligation of the judiciary. Several federal courts have explicitly recognized that obligation when

school officials have banned books under circumstances similar to those presented by this case.

In *Minarcini* v. *Strongsville City School District,* 541 F.2d 577 (6th Cir. 1976), the Sixth Circuit held unconstitutional the unshelving of certain books from the school library because they contained ideas that school board members found "distasteful." *Id.* at 582. In *Zykan* v. *Warsaw Community School Corporation,* 631 F.2d 1300 (7th Cir. 1980), high school students challenged the removal of certain books from the high school library and from the English curriculum. In adjudicating this controversy, the Seventh Circuit held that courts may properly intervene when school officials remove books from the library "as part of a purge of all material offensive to a single, exclusive perception of the way of the world. . . ." *Id.* at 1308.

In *Right to Read Defense Committee of Chelsea* v. *School Committee of Chelsea,* 454 F. Supp. 703 (D. Mass. 1978), plaintiffs challenged the removal from a school library of an anthology that contained a poem with allegedly "offensive" language. While conceding to the school board broad discretion over its curriculum, the court found that school officials had abused their discretion by " 'sanitizing' the school library of views divergent from their own. . . ." *Id.* at 714. As in the present case, what was at stake was "the right to read and be exposed to controversial thoughts and language—a valuable right subject to First Amendment protection." *Ibid.*

In *Salvail* v. *Nashua Board of Education,* 469 F. Supp. 1269 (D.N.H. 1979), the issue was the removal of *MS* magazine from the high school library. The school board acted because its members objected to certain advertisements and to some references to a "communist" periodical and "communist folk singers." Holding that the reasons given for the removal "failed to demonstrate a substantial and legitimate government interest," *id.* at 1275, the court ordered the board to restore the magazine.

In those cases, as in the decision below, federal courts have proceeded with appropriate caution. They have given due deference to the discretion of school officials in regulating their curricula and their libraries. But the courts have also recognized that there are limits to that discretion and that, when they are exceeded, great dangers are posed both for the academic community as well as for the society at large. At such a time, federal courts must intervene.

This case presents those dangers.

II.

THE UNCONSTITUTIONALITY OF DEFENDANTS' BOOK BAN IS NOT OVERCOME BY THE FACT THAT SOME OF THE BOOKS CONTAIN SOME VULGAR LANGUAGE.

Introduction

Defendants do not deny that their actions were in large measure prompted by their disagreement with the ideas expressed in the books. The constitutional impropriety of that motivation is discussed in point I. Defendants also insist that their book-banning resolution was motivated by a concern about vulgar language. That justification, too, is constitutionally suspect. Before exploring its deficiencies in detail, a preliminary observation is pertinent.

Although the record amply supports defendants' contention that they are offended by vulgar language, the record is far more equivocal on whether that concern actually motivated their actions.[12] As we have seen, defendants' decision to ban these particular books was precipitated by their attendance at the PONY-U conference. While there, they were given a list of

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12 Judge Mansfield's dissenting opinion assumes that vulgarity was the motivating factor behind defendants' actions, an assumption not shared by Judge Newman. 638 F.2d at 437. It should be noted that one of the books, *A Reader for Writers*, was banned although there is no indication that it contains any vulgar language whatever.

"objectionable" books and, on separate flyers, excerpts from some of the books, as well as comments about some of the books and authors. Most of the excerpts contained vulgar language.

Despite the abundance of vulgar language in those materials, the record suggest that vulgarity was simply a pretext for this action. That is the only plausible explanation for the fact that at no time since the PONY-U conference has the school board ever reviewed its library collection to see if any other books contained vulgar language. Nor has the board ever attempted to explain its idiosyncratic concern. As Judge Newman noted after reviewing the record:

> A school's effort to regulate vulgarity is not unconstitutional because it is not completely thorough, but if only isolated examples are condemned, the inference will be strengthened that vulgarity was the excuse, not the reason, for book removal whose principal, or at least partial motivation was political.

638 F.2d at 437.

Even if vulgar language were the reason, and not the excuse, for defendants' action, it is not a constitutionally sufficient justification for banning the use of books in a school system. Defendants allege that such language is offensive to a majority of the parents in their community and we have no reason to doubt them. Nor do we doubt that these parents do not permit such language in their home and do not want such language in their school. It does not follow, however, that, because parents can keep books containing such language out of their home, school boards as their representatives can keep those books out of their schools.

The school board is not simply the parent to the children of the school district. It is also an agency of the state. Unlike parents, it must operate within the constraints of the Constitution. Although children have no First Amendment rights while at home, they do when they are at school. *Tinker* v. *Des*

Moines Independent School District, 393 U.S. 503 (1969). Parents may forbid children from wearing black armbands; schools may not.

Similarly, with respect to vulgar language, parents may do as they wish. If they believe that prohibiting their children from reading these books at home is an appropriate means of teaching proper language, they may do so, whether or not the means is a rational one.

School boards, however, must take account of the First Amendment. They, like parents, of course have the right to teach proper language, but, unlike parents, they are limited in the means they may choose. They may, of course, teach that vulgarity is bad and may prohibit its use in the classroom. The prohibition is a narrow one, and the consequences are limited. Moreover, the justification for the prohibition is compelling; to permit such language in class discussion carries with it an implicit endorsement of such language by students.

Banning books, however, is another matter. When, as in the case of each of these books, the vulgar language is a minor aspect of a book that is otherwise widely respected, then the effect is much broader. Not only vulgar language but a worthy book has been banned.[13] Moreover, the justification for the ban is far more attenuated. Permission to read a book surely carries with it no suggestion that all of its language is appropriate for use in a classroom or anywhere else, and it is, in any case, a suggestion easily disspelled.

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13 It is because language and excerpts, viewed outside of their context, can give a distorted impression of a book that this Court has insisted that judgments of obscenity be based on the whole book. *Roth* v. *United States,* 354 U.S. 476 (1957).

In his dissent in *FCC* v. *Pacific Foundation,* 438 U.S. 726, 770 n.5 (1978), Justice Brennan shows how respected books can be made to appear vulgar by the judicious selection of excerpts. Judge Mansfield's dissent in the Court below achieves the same dubious result with books that have won and been nominated for some of the nation's most valued literary awards.

Banning books because of isolated passages of vulgar language is not rationally related to the teaching of proper language. Even if it were, there are means available to achieve that end that less drastically impinge on First Amendment rights.

A. The book ban is unconstitutional unless it is rationally related to a compelling state interest.

This Court has often reiterated that government regulation that abridges First Amendment rights can only be sustained if it is rationally related to a compelling state interest. See, *e.g.*, *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976). In this case that nexus is conspicuously absent. There is, specifically, no rational relationship between the removal of these books and defendants' desire to teach proper language and grammar.

The Board's position on this issue was summarized by its President. Speaking of *A Hero Ain't Nothing But A Sandwich*, he said, "It is completely improper English and you can't try to teach proper English and allow students to read things that are improper." (Ahrens Dep. at 54-55) The assumption appears to be that students, even by the time they reach high school, are unable to appreciate that dialogue in books is not intended as a grammar lesson.[14] If they are that unsophisticated, what serious modern author will they be able to read? If students will simply imitate the language that characters use in books, can they be safely permitted to read books whose characters speak with foreign accents or in regional dialects? Should students not be permitted to read Shakespeare, for fear they will imitate his characters' slang?

Some of the language to which the Board objects is the kind "heard repeatedly by those who walk the streets of our cities." *Koppell* v. *Levine*, 347 F. Supp. 456, 459 (E.D.N.Y. 1972). Will the Island Trees school libraries be permitted to retain any

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14 All of the passages to which defendants object are of characters' dialogue. Defendants do not claim that any of the books are otherwise ungrammatical or vulgar.

books that accurately depict city life? Or will they be permitted to retain only those books that sanitize language and, thus, sacrifice accuracy?

It is fair to suggest that a consistent application of defendants' policy concerning bad language would jeopardize much of modern fiction and most nonfiction that attempts to reproduce how people speak in their unguarded moments. The words of Judge Woolsey in his landmark decision lifting the ban on Joyce's *Ulysses* are particularly apt:

> The words which are criticized as dirty are old Saxon words known to almost all men and I venture, to many women, and are such words as would be naturally and habitually used, I believe, by the types of folk whose life, physical, and mental, Joyce is seeking to describe.

United States v. *One Book Called "Ulysses"*, 5 F. Supp. 182, 183-184, aff'd 72 F. 2d 705 (2d Cir. 1934).

The irrationality of banning books on the basis of isolated passages is further evident from the *Guidelines for the Selection of Library Resources, Textbooks and Other Instructional Materials* issued by the New York Board of Regents, the agency with overall responsibility for standards of education in New York State. Those Guidelines caution that a literary work ". . . be judged as a whole" and that, where a book contains "sexual incidents or profanity," a decision as to its propriety for school use should be "made on the basis of whether the book presents life in its true proportions, whether circumstances are realistically dealt with, and whether the book is of literary value."

Despite the tenuous justification for banning books because of occasional vulgar language, defendants argue that the constitutionality of their actions is demonstrated by *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978). However, that decision was founded on concerns not present here. The Court noted, first, that radio broadcasts are accessible to young, unsupervised children. But students in the Island Trees junior

and senior high schools are teenagers. In the unlikely event that guidance or counseling were necessary, teachers or librarians are available to offer it.[15]

The Court was also concerned that a radio broadcast could be received at home, where the right to be free from offensive words may justify a higher degree of state regulation. Schools, however, are not homes; exposure to thoughts and ideas—and means of expressing them—that are not heard at home is one of the purposes for which schools exist. Nor do these books, in their occasional use of profanity, bear any resemblance to the pervasively vulgar monologue at issue in *Pacifica*. Whether or not the broadcast of these books on the radio would be appropriate, their use in school is surely a legitimate part of the educational experience of junior and senior high school students.

B. Defendants' interest in teaching proper language must be pursued by narrower means than banning books.

Even if there were a plausibly rational connection between defendants' ban of these books and their interest in teaching proper language, defendants' actions in this case run afoul of another fundamental First Amendment principle.

It is well settled that when a government interest impinges upon First Amendment rights, "it is not enough that the means chosen in furtherance of the interest be rationally related to that end." *Elrod* v. *Burns, supra,* 427 U.S. at 362. "If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a . . . [means] that broadly stifles [free speech]." *Kusper* v. *Pontikes,* 414 U.S. 51, 59 (1973).

The Island Trees book ban "broadly stifles" free speech. In their indiscriminate condemnation of vulgar language, defendants ignore the relationship between ideas and the words used

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15 That the books banned by defendants were recommended for use in junior and senior high schools by book reviewers suggests that the fear of "enlarg[ing] a child's vocabulary" *id.* at 749, is not relevant here.

to express them, *Cohen* v. *California,* 403 U.S. 15, 26 (1971), and thereby censor ideas that draw their "emotive" force, *ibid.*, from the powerful, and sometimes harsh and vulgar language with which they are expressed.

Consider, for example, *Go Ask Alice,* a book about a teenage drug addict who commits suicide. It is a devastating indictment of drug use. It may be that the same factual information is contained in bulletins from the National Institute of Drug Abuse, but it is not probable that many adolescents read them. In any case, if, as seems likely, *Go Ask Alice* will have a greater emotional impact on potential drug users than a NIDA bulletin, consider the terrible price that some students may be paying because their school board does not like dirty words.

There are, of course, means available to the defendants to teach their students proper language or respect for certain values without preventing them from reading valuable books. Indeed, the alternatives are so obvious that one hesitates to belabor the point. Students can be allowed to read—and, perhaps, criticize—bad grammar in order to learn proper grammar. Alternatively, the books could be banned from use in grammar classes. If some of the language in these books is, as defendants claim, degrading to blacks or women, could an effective lesson in the use of non-racist and non-sexist language not be built upon such passages? But surely books as highly regarded as these, books uniformly recommended for use in junior and senior high school libraries, books that include among them some of American literature's most perceptive depictions of life in this country, cannot be unsuitable for any use in the school curriculum.

If there are any legitimate goals of the book ban, there are countless means available to accomplish them short of a total prohibition. Since the ban is not the alternative that least drastically restricts First Amendments rights, *Shelton* v. *Tucker,* 364 U.S. 479 (1960), it is, for that reason alone, unconstitutional.

C. The school officials' concern for vulgar language cannot be separated from their concern for ideas. Even if the concern about vulgar language is a constitutionally acceptable basis for removing books, defendants cannot plausibly claim that they would not have removed these books "but for" their language.

Even if the Court were to hold that defendants' concern about vulgar language is a constitutionally sufficient motive for banning books, and even if defendants could establish that their concern with vulgar words was not a pretext for their actions, the ideological motive for the ban would continue to render it unconstitutional. As Judge Newman noted in his concurring opinion, "First Amendment values would be imperiled if a motivation concerned with the language of a book were permitted to justify an act of suppression also motivated by the book's political content." 638 F.2d at 438. This Court's analysis of the mixed-motive question in *Mt. Healthy City School District Board of Education* v. *Doyle,* 429 U.S. 274 (1977), is not to the contrary.

In *Mt. Healthy,* the Court held that, when a discharge from employment may have been prompted by both protected and unprotected conduct, the employee was obliged to prove that he would not have been discharged "but for" the exercise of his First Amendment rights. The assumption underlying the Court's opinion is that the permissible motive can be separated from the impermissible motive. That cannot be done here. Vulgar language, the arguably permissible motive, still enjoys some constitutional protection. *Cohen v. California, supra.* If, as *Cohen* tells us, ideas are often inseparable from the words used to convey them, then in cases such as the one presented here, motives may be so inextricably interwined as to preclude the isolation of permissible from impermissible motives.

Accordingly, it is simply impossible to engage in the "but for" analysis described in *Mt. Healthy* when dealing with language and the ideas conveyed by that language. As Judge Newman observes, "the content of a book and its manner of

expression are too intimately related to be subject to entirely separate analysis." 638 F.2d at 438. Petitioners do not even pretend that these factors were separate in their minds and have never asserted that the books would have been removed from the library shelves solely because of their language.

The Island Trees school officials sought to exclude ideas which made them uncomfortable. In so doing they have acted unconstitutionally and their behavior is not redeemed on the ground that part of their discomfort flowed from the words which were used to express distasteful thoughts.

III.

AD HOC PROCEDURES AND IMPRECISE STANDARDS VESTED THE SCHOOL BOARD WITH UNCONTROLLED DISCRETION TO CENSOR IN VIOLATION OF FIRST AMENDMENT DUE PROCESS PRINCIPLES.

Respondents have demonstrated that the book ban imposed by the Island Trees school board violates substantive constitutional standards. This Court has also repeatedly recognized, however, that the process by which government seeks to regulate areas infused with First Amendment values is critical in maintaining "breathing space" for First Amendment rights. The *ad hoc* nature of the process utilized by the school board in banning the nine books vested the board with virtually uncontrolled discretion to act as a censor, leading Judge Sifton to condemn the "erratic, arbitrary and free-wheeling manner," 638 F.2d at 416, in which the defendants behaved. It is to avoid such behavior that this Court has long required that the state act pursuant to established standards and procedures when regulating in areas that touch upon First Amendment freedoms. *NAACP* v. *Button,* 371 U.S. 415, 438 (1963).

At no time has the Island Trees school board ever elaborated a set of substantive standards setting forth educational policy

governing the selection and/or retention of books[16]. (J.A. 25) Instead, members of the Board sought to judge the books against such vague and amorphous criteria as "anti-American," "anti-Christian," "anti-semitic," "just plain filthy," "inappropriate," "not germane to the curriculum," and "incompatible with community values." Such a bewildering array of *ad hoc* criteria hardly qualifies as a serious attempt at enunciating a generally applicable set of standards which are capable of curtailing politically motivated censorship.

The Board's *ad hoc* decision-making process has made it virtually impossible to discern what, if any, educational policy the Board was seeking to advance in banning the books. As Judge Sifton noted below:

> What is required in order to avoid the effect of governing school affairs by a vague and indefinite pall of orthodoxy is the development of a set of sufficiently objective criteria for the identification of speech which will be objected to and a sufficiently regular procedure for applying those criteria in concrete cases. . . .

638 F.2d at 418 n.13.

Instead of "sufficiently objective criteria," the Board elected to proceed on a purely subjective basis, evaluating each book pursuant to vague and shifting criteria which evolved as the board went along.

The net result of the board's failure to enunciate articulable standards against which its specific acts may be measured was the emergence of a discretionary process which invited arbitrary and improperly motivated decision-making.

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16 The closest the Board has come to enunciating a policy is the "academic freedom" clause in its collective bargaining agreement which guarantees teachers "the right to introduce and to explore controversial material provided only that the material and manner in which it is presented are in good taste, appropriate to grade level, and relevant to course content." (J.A. 52) Disputes as to particular books were to be resolved by a committee appointed by the Superintendent. (J.A. 56)

As Judge Sifton pointed out in the Court below, the school board's decision suffered from "substantive confusion, not to say incoherence, as to the reasons the books were being removed from the libraries." 638 F.2d at 417. In March 1976, the school board announced that "the books . . . contain material that is offensive to Christians, Jews, Blacks and Americans in general . . ." (J.A. 9) In April, it instructed the Book Review Committee to evaluate the books on the basis of "(1) their educational suitability; (2) good taste; (3) relevance; [and] (4) appropriateness to age and grade level." (J.A. 67) In July, the Book Review Committee advanced specific recommendations with respect to the books, and the school board rejected those recommendations without giving any reasons whatever. In October 1977, the *post hoc* rationalizations for the book-banning included the observation that the school boards' decision "reflect[ed the] values and wishes" of the community. (J.A. 28-29). It is impossible to imagine a more arbitrary, standardless procedure than that employed by defendants.

In *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969) the Court found a Birmingham ordinance to be unconstitutional because the ordinance conferred upon the city commission virtually absolute power to prohibit any "parade", "procession" or "demonstration" on streets or public ways. In doing so, the Court noted that the ordinance lacked "the narrow, objective and definite standards to guide the licensing authority." *Id.* at 150-151. The concern expressed in *Shuttlesworth* was that such vaguely worded ordinances conferred excessive discretion upon local officials and thereby invited arbitrary censorship.[17] Precisely the same concerns apply to the case at bar.

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17 Permit cases such as *Lovell* v. *Griffin*, 303 U.S. 444 (1938) and *Niemotko* v. *Maryland*, 340 U.S. 268 (1951) are examples of settings in which this Court has declined to allow the complete fusion of the enunciating and implementing functions in the regulation of First Amendment activity. Other examples are statutes which purport to regulate expressive activity, but do so in such vague terms that they grant the implementing official the power to make policy even as he

A general concern about vague and imprecise standards is compounded where, as here, the very same administrative officials that are authorized to promulgate a standard are also authorized to enforce it. Indeed, our constitutional tradition informs us that whenever the same governmental body is vested with the power to enunciate general rules and the power to apply those rules to specific settings, the danger of governmental arbitrariness exists.[18] The danger of governmental abuse is unquestionably heightened when such a body is permitted to act in the absence of articulated pre-existing standards. The operation of the schools may be one of those settings where it is appropriate to permit the merging of the rule-making and enforcement functions. But when fragile values of academic freedom and the First Amendment are at stake, public officials may not make up the rules at the same time as they decide to enforce them. The requirement of pre-existing standards increases the likelihood that some rational, deliberative process will precede official action.

In *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958), the Court noted that "the line between speech unconditionally guaran-

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(footnote continued)

implements it. See *Cox v. Louisiana*, 379 U.S. 536 (1965); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Smith v. Goguen*, 415 U.S. 566 (1974). Similarly, in the context of the seizure of allegedly obscene material, the Court has insisted upon independent judicial determinations as a check upon the potential abuse posed by permitting law enforcement officials to effectively define the crime and penalize the criminal conduct at the same time. See *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964). See also *Freedman* v. *Maryland*, 380 U.S. 51 (1965).

18 The most obvious manifestation of our preference for placing the power to enunciate and the power to implement in different governmental bodies is the principle of Separation of Powers. Even within a single branch, moreover, care is generally taken to separate the two functions. Thus, in a judicial setting, power is diffused between judge and jury; in an administrative setting, power is often diffused among specialized organs; and in a legislative setting, bi-cameralism serves to provide a degree of separation. See generally, Sharp, *The Classical Doctrine of American Separation of Powers*, 2 Chi. L. Rev. 385 (1935); Vile, *Separation of Powers* (1965).

teed and speech which may legitimately be regulated, suppressed or punished is finely drawn. . . . The separation of legitimate from illegitimate speech calls for sensitive tools. . . ." Among the most efficient of these "tools" is the imposition of the relatively straightforward obligation that censorial decisions be preceded by rational, deliberative processes. At the most rudimentary level a public official, engaging in censorship, should be required to "state the reasons for [a] determination and indicate the evidence [or criteria] relied on." *Goldberg* v. *Kelly,* 397 U.S. 254, 271 (1970).[19]

Where public officials act in the absence of standards, rational decision-making is difficult if not impossible. Defendants' actions illustrate the point. Although there was a period of five months between November, when Ahrens and Martin discovered the books in the school libraries, and March, when the board ordered that the books be removed, the board had still not articulated any reasoned standard to justify their action. Finally, in April the Board selected a book review committee with instructions to read the books and advance recommendations as to their disposition. The committee convened in July and made certain recommendations, concluding that five out of the books be returned to the library. The school board, without any explanation whatever, simply disregarded the recommendation of the book review committee. That the school board felt free to do so was the inevitable consequence of the absence of substantive standards and procedural requirements.

A requirement that a school board, contemplating censorship, act pursuant to an articulated policy of general applica-

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19 One virtue of the procedural requirement that an administrative official state reasons for a determination is that such a statement enables a reviewing court to evaluate the administrator's reasons. Where, as in a book removal situation, a court might be called upon to evaluate the motive underlying an administrative decision, such a statement can, indeed, prove useful. Regrettably, no such contemporaneous statement with respect to each of the books exist in the case at bar.

tion would achieve the salutary purposes that First Amendment due process mechanisms are intended to serve. Such a requirement would limit otherwise untethered discretion. It would guard against the potential invocation, by implementing officials, of *post hoc* rationalizations for their conduct, and it would thereby reduce the possibility that impermissibly motivated behavior will be masked by plausible but ultimately disingenuous justifications.

CONCLUSION

For the foregoing reasons, plaintiffs are entitled to summary judgment. In the alternative, the judgment of the Court of Appeals should be affirmed and this action should be remanded to the District Court for trial.

Dated: New York, New York
December 31, 1981

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Office - Supreme Court, U.S.
FILED
FEB 23 1982
ALEXANDER L. STEVAS,
CLERK

No. 80-2043

IN THE

Supreme Court of the United States

October Term, 1981

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26; RICHARD AHRENS, FRANK MARTIN, CHRISTINA FASULO, PATRICK HUGHES, RICHARD MELCHERS, RICHARD MICHAELS, AND LOUIS NESSIM,

Petitioners,

—against—

STEVEN A. PICO, by his next friend, FRANCES PICO; JACQUELINE GOLD, by her next friend, RONA GOLD; RUSSELL RIEGER, by his next friend, SAMUEL RIEGER; GLENN YARRIS, by his next friend, RICHARD YARRIS and PAUL SOCHINSKI, by his next friend, HENRY SOCHINSKI.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF
(In Support of Writ)

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INTRODUCTION

A review of Respondent's answering brief and those of the ten opposing *amici* compels a reply even at the risk of some repetition and of further burdening the Court. These answering briefs are so replete with incorrect inferences, misconceptions and falsely premised conclusions, none of which is borne out by the record, that close examination of the record becomes essential.

Almost without exception the answering briefs consistently and repetitiously make the assumption that Petitioners have without question acted to suppress ideas and points of view and attempted to impose orthodoxy. The source of the school board's initial information concerning the proscribed materials has been used to condemn the board's true motivation and it has been insinuated that the board members are "village tyrants" rather than "village Hampdens." (*West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943); brief of Association of American Publishers, Inc., et al., p. 15).

It is hoped that this reply will draw the Court's attention to the true nature of the actions complained of so that they may be placed in proper perspective in relation to the complex and momentous legal issues raised herein. Very appropriate to the matter at bar is Mr. Justice Frankfurter's statement in his dissent in *West Virginia State Board of Education v. Barnette, supra*, that

> To suggest that we are here concerned with the heedless action of some village tyrants is to distort the augustness of the constitutional issues and the reach of the consequences of our decision. 319 U.S. at 650, 651.

POINT I

PETITIONERS' ACTIONS WERE NOT INTENDED TO NOR DID THEY SUPPRESS IDEAS OR POINTS OF VIEW.

A blatantly incorrect allegation demanding immediate reply is that introducing Point II of Respondents' brief (p. 23) that "Defendants do not deny that their actions were in large measure prompted by their disagreement with the ideas expressed in the books." Defendants most assuredly, forcefully and unequivocally deny that very thing. Such allegation typifies the recurrent theme of the briefs of opposing *amici* that the Island Trees Board of Education in fact suppressed ideas and points of view and intended to do so by its actions. Petitioners are forced to again (See Petitioners' brief in chief at pp. 4, 10, 39, 40) and more explicitly deny such allegations.

There is not one allegation either in the complaint herein (J.A. pp. 1-7) or in Respondents' own statements pursuant to Local Rule 9-g implying in any way or manner that the school board either intended to or did in fact suppress or disagree with the ideas expressed in the banned books. Opposing counsel agreed in fact that there was no preclusion among the student body of discussion of the books themselves or their themes [ideas] nor was the staff instructed not to discuss them or not to comment upon their ideas or the position [points of view] that they represented. The intent of a 9-g statement is to limit the issues before the trial court and one issue eliminated was whether the board suppressed ideas or points of view. Equally important is the absolute failure of any of the answering briefs to indicate, identify or describe in any way those ideas or those points of view which were suppressed. Nowhere in the hundreds of pages of opposing briefs has there been any indication of the nature of the idea, ideology, concept, doctrine or theme of thought it is charged has been suppressed nor has there been even such an indication in the complaint or

Respondents' 9-g statement.

A *prima facie* case of the nature complained of requires much more than the language borrowed by Respondents from the case of *Minarcini v. Strongsville City School Dist.*, 541 F. 2d 577 (CA 6, 1976) alleging merely that the board members proscribed the books because they offended "their social, political and moral tastes". (J.A. p. 4) Nowhere has the charge been made of the banning of all material reflecting a particular ideological viewpoint or that the board's action was part of a consistent program to exclude particular ideological materials. (See *Challenging Ideological Exclusion of Curriculum Material: Rights of Students and Parents* - Harv. CR-CLLR, Vol. 14, pp. 518-22 (1979)). There has been no charge of a comprehensive censorship (or sanitization) of all material inconsistent with allegedly "orthodox" tenets. All that has been charged as a matter of record is that complained of in the complaint and in the 9-g statements. The cries of suppression of "ideas" and "viewpoints" contained in opposing briefs can have no probative value nor should they provide the stimulus for a lengthy circus-like trial during which Respondents can fish for patterns of exclusion. There are none.

If the board had determined to exclude a particular ideology, doctrine or body of thought it would certainly have proceeded in different fashion. Had more than vulgarity, indecency and bad taste motivated it, it would have approached matters in a more thorough and well-defined manner including, most probably, a review of all materials so as to effectively exclude concepts or ideologies. There were thousands upon thousands of books remaining in the school libraries after these were removed. The removal of such a random group of volumes as these cannot have possibly affected the presentation of those concepts or ideologies necessary to a balanced curriculum. The only common strain running through the proscribed materials is the vulgarity, indecency, bad taste and sexual allusions contained therein.

Proof of this common strain is easily seen. It is hoped that no more federal jurists will be compelled to read the volumes in question as Judge Mansfield (dissenting in the Court below) felt was necessary. However his conclusion must carry great weight when dicussing an allegation of suppression of ideas. Judge Mansfield stated that all but one of the books contained "indecent matter, vulgarities, profanities, explicit descriptions of sexual relations, some perverted, or disparaging remarks about Blacks, Jews or Christ." (638 F. 2d 404, 419). (In addition he found "freedom of the school's faculty and students to discuss in or out of school the ideas contained in the discontinued books..." (at p. 419)). Other jurists have described at least two of the discontinued books in the following manner:

> "How any educator entrusted during school hours with the educational, emotional and moral welfare and healthy growth of children could do other than reject such cheap, valueless reading material, is incomprehensible. Its repetitious obscenity and immorality, merely degrade and defile, teaching nothing" *Todd v. Rochester Community Schools*, 200 N.W. 2d 90 (1972) referring to *Slaughterhouse Five.*

> "Acts of criminal violence, sex, normal and perverse, as well as drug shooting are graphically described." *Presidents Council District 25 v. Community School Board No. 25*, 457 F. 2d 289, *cert. den.* 409 U.S. 998 (1972) at p. 291 referring to *Down These Mean Streets.*

Additional evidence of the board's intent and motivation can be adduced by examining the depositions of the only two of the board's seven members whom Respondents chose to examine and by examining the exhibits annexed to Petitioners' motion for summary judgment, many of which contain comments by the board made as part of the *res gestae.* Mr. Ahrens not only answered Respondents' counsel's questions at length under oath regarding his reasons, indicating no intent to suppress ideas or

points of view, but also countered readily and logically two of the arguments raised on numerous occasions by *amici*. *Amici* have made much of the critical acclaim of some of the banned books. Mr. Ahrens responded to a similar insinuation stating "I would imagine on most every book that is written there is going to be good and bad things said about it, but my concern was what I felt regarding my decisions, not [what] some critics [felt]."(dep. at pp. 72, 73). In responding to the oft repeated reminder that the streets were full of language of the type objected to Mr. Ahrens stated (p. 77) that the issue was not whether such language should be used on the streets of the South Bronx, but whether it should be used in schools.

It should be apparent therefore upon review of the record herein that an impermissible ideological sanitization of the school's libraries as a result of a desire to follow the political ideology of a particular organization just did not occur. What did happen is that well intentioned board members in furtherance of their duty to select and review curricular materials became aware of purportedly objectionable materials, examined same, found some, but not all, to be objectionable and by varying votes at a public meeting proscribed the volumes in question.

POINT II

PETITIONERS HAVE NOT CREATED AN IMPERMISSIBLE "PALL OF ORTHODOXY" OR DENIED THE PROPER PLACE OF HETEROGENEITY NOR SHOULD THEY BE COMPELLED TO KEEP THE DISTRICT'S LIBRARIES AND CURRICULUM COMPLETELY NEUTRAL IN CONTENT.

Respondents and *amici* have made much in their briefs of an alleged First Amendment compulsion of heterogeneity in the nation's secondary schools citing as support the "marketplace of ideas" concept referred to in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) at 603 and cited with approval in *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969) at p. 512. (Respondents' brief at 8, 11, 12). It is submitted that such a model is inapposite. *Keyishian* related to a university environment. *Tinker* was in error (albeit not crucial to the *Tinker* holding) in positing a "marketplace of ideas" model for elementary and secondary schools.[1]

To keep curriculum neutral in content and end all exclusionary practices in the nation's public schools is to abandon a key role basic to their operation—that of the responsibility of local boards of education to attempt to transmit a community's particular moral, social and political values to its students. Flowing from this are the equally important (and essential in the case at bar) concepts of local control of public education and the importance of judicial restraint. As stated in a recent government commission report:

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[1]For an excellent critique of *Tinker* as it relates to the issues at hand see *The First Amendment and Public Schools: The Case Against Judicial Intervention*, D. Diamond, Tex. L.R. Vol. 59: 477 (1981).

> Curriculum is neither neutral nor impartial. It necessarily reflects value judgments that significantly affect a child's perception of himself and society in general. The school shapes the culture and values of its students by presenting favorably certain styles and customs. U.S. Commission on Civil Rights, *Toward Quality Education for Mexican-Americans*, U.S. Gov't. Printing Office (1974).

Heterogeneity is necessary and important, but not to the extent that it requires each local school district to be a "marketplace of ideas" to the exclusion of efforts by elected school officials to inculcate those moral and social values deemed essential by that community. The values of our nation with its vast and desired hetereogeneity are a reflection of the varied yet distinct (in emphasis) values of the thousands of communities of which it is comprised. "Value inculcation, rather than value neutrality, has been the tradition of public education since the beginning of the American republic." Tex. L.R., supra, 59:477 at 499. This has been aptly put by Mr. Justice Powell in *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1972) when he stated:

> Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence. An analogy to the Nation-State relationship in our federal system seems uniquely appropriate...No area of social concern stands to profit more from a municipality of viewpoints and from a diversity of approaches than does public education, 411 U.S. at 50.[2]

Practical exigencies, in addition to the pall placed on experimentation and innovation, would exist were school districts re-

[2]For an interesting development of the position that experimentation and innovation will be suppressed if opposing *amicis'* theory of different constitutional restrictions for shelving than for removing library books is upheld, see brief of supporting *amicus*, The Legal Foundation of America, pp. 7, 19-21. See also E. Durkheim, *Education and Sociology*, The Free Press (1956) (at pp. 70, 71) for support of the theory that the values of a society reflect the sum of the myriad homogeneous milieu (school districts) of which it is comprised.

quired to limit criteria for library book removal to availability of shelf space, obsolescence and architectural and fiscal necessity as many opposing *amici* have insisted. Not only are books commonly selected with the aid of librarians from available lists, subject to budget limitations. On occasion they are given to a school district as a donation or bequest. One book about which there has been substantial furor recently, *Our Bodies, Ourselves: A Book By and For Women*, "...is being distributed to schools nationally by abortion and sex-information clinics, according to Moral Majority and various parent organizations." (*Liberty*, Vol. 77, No. 1, January-February, 1982). If such is the case it is doubted a recipient district's board is even aware of its receipt and shelving since no fiscal records would exist.

Most librarians should exhibit a sensitivity toward acquisition of a volume concerning which there may be claims of indecency or vulgarity, but ours is not a perfect world. The librarian of the Chelsea School Committee (which was sued and compelled to restore an extremely vulgar poem to the school shelves) selected the anthology which contained the objectionable poem without having read the poem. That book was one of *one thousand* paperback books acquired at one time from one publisher. (*Right to Read Defense Committee of Chelsea v. School Committee of the City of Chelsea*, et al., 454 F. Supp. 703 (D. Mass. 1978) at p. 706). By this or similar means many objectionable materials can be initially acquired unintentionally. Another scenario could be that of a bigoted librarian or staff member across whose desk passed a review of a volume noted solely for its bias and prejudice against a given minority. Although objectionable it could be intentionally acquired but under the legal principles proposed by Respondents and *amici* it could not be removed because of its content. Such an effect is undesirable and unsupported in law.

Content based decisions are commonly and properly made in the selection of curricular materials for public schools. A district

whose student body boasts a 95% college entrance rate will select quite different library materials than one in a mine or mill town with a 15% college entrance rate. One in a ghetto area of a major city may well select a heavier ratio of certain types of materials while a small farm community in the mid-West will select a vastly different mix depending upon the values its community (expressed through its governing board's decisions) desires to be reinforced and transmitted.

If a content based decision predicated upon the obscene language of a given curricular material is impermissible then the corollary must hold true. That is that anything goes, i.e. there will be no circumstances under which the presence of language which is not legally obscene can be used as a reason for prohibition. This is senseless in the context of public schools. To require value neutrality or to prohibit some degree of homogeneity in the public schools will violate the very principles necessary to the continued viability of our public schools and the concept of local control of public education.

The brief opposing *amicus*, American Library Association, et al, reminds the Court that "the case is about a *library*, not a school's curriculum" (at p. 3). This statement indicates a vital misconception of the degree to which a public school's library book collection (and many other forms of media materials these days since school libraries have become "media centers") are part and parcel of the district's curriculum. This is supported by the recent holding of the Third Circuit in *Seyfried v. Walton*, 50 U.S.L.W. 2430 (12/29/81), that a school district could bar performance of a musical with sexual content basically because the performance was an integral part of the school's educational program, i.e. part of the curriculum as contrasted with student newspapers and other "non-program related expressions of student opinion". School library collections have traditionally been and continue to be integral parts of the school's educational program and cur-

riculum, statements by *amici* to the contrary notwithstanding.

Respondents and opposing *amici* have also drawn incorrect analogies or have mistakenly applied principles which are not pertinent to the issues herein. We are not here concerned with a general public library as distinguished from a public school library nor are we dealing with a general public forum from the nature of which springs much of the neutral content rights asserted. It should also be remembered that although a school auditorium is much more of a public forum than a school library, a speaker no matter what his persuasion or topic, could be banned if his presentation were laced (or even lightly infused) with obscenities. The public schools, although still governed by the precepts of the Constitution, constitute a highly unique constitutional environment.

POINT III

RESPONDENTS AND OPPOSING AMICI DREW IMPROPER CONCLUSIONS FROM THE FACTS SURROUNDING THE ACQUISITION OF INFORMATION CONCERNING THE POSSIBILITY OF OBJECTIONABLE MATERIALS IN THE SCHOOL LIBRARIES.

Both directly and by innuendo Respondents and opposing *amici* have attempted to impute to Petitioners all manner of tainted motivation as a result of the source of the initial information precipitating the ban which was obtained by one board member at a conference sponsored by a conservatively oriented educational organization. An examination of the record will show this to have been a great disservice to the Island Trees Board of Education. It distorts the application of some of the important principles upon which a decision in this case will in part be based.

The organization, Parents of New York - United (PONY-U), has been referred to so often and so disparagingly in the opposing briefs that one would have expected to have it appear as a named party in the caption of this action. Not only have its motives been impugned and transferred to the mind set of all seven members of the Island Trees Board of Education, but not one opposing brief has used the word "education" in describing it.[3] As shall be seen

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[3]The P.E.N. American Center brief refers to an "issue oriented pressure group" (p. 32) using "hysterical fringe group politics" (p. 6); that of the American Jewish Congress, et al to a "self proclaimed conservative group" (p. 4); that of New York State United Teachers to a "conservative political conference" (p. 2); that of the National Education Association to a "politically militant parents group" (p. 3 F.N. 2); that of the Anti-Defamation League of B'nai B'rith to a "conservatively oriented parents group" (p. 4) and that of Respondents to a " 'conservative' parents group" (p. 1) "with a particular social and political ideology" (p. 19). The record, however, describes it as "a conservative organization...composed of parents concerned about *education* in this State." (638 F. 2d 404 at 407 - Judge Sifton quoting board member Ahrens); an "issue oriented *education* group," (638 F. 2d 404 at 436 - Judge Newman's description); an "*educational* conference sponsored by PONY-U" (J.A. 22 - affidavit of R. Ahrens) and "an organization interested in *educational* affairs in New York State" (J.A. 101 - affidavit of F. Martin). (Emphasis provided)

this is both misleading and totally unjustified.

This attempt to assess guilt (or transferred motivation) by association is evidenced by the statement in Respondents' brief (at p. 19) referring to the "inference that the political, moral and religious judgments made by the organizers of the PONY-U conference have supported this ban from beginning to end." That this is a totally erroneous inference is clear from the record.

The governing body for higher and lower education in the State of New York is the Board of Regents comprised of twelve Regents elected one each year by the state legislature. Such a Regent was Genevieve Klein whom the then board president, Mr. Ahrens, and Vice President, Mr. Martin, had heard speak at a Nassau-Suffolk [counties] School Boards Association dinner at a nearby high school. At that dinner she spoke personally with them and recommended that they attend a forthcoming PONY-U conference at which she would speak. They had never before attended a PONY-U function but decided to attend this one along with a third board member solely because of Mrs. Klein's recommendation and did so. (Ahrens dep. pp. 13, 21; Martin dep. pp. 4-8, 10; J.A. pp. 21, 22, 101, 102).

At the conference another school district (Randolph, New York) had prepared a five page compendium of excerpts from books to which the Randolph board members attending objected (J.A. pp. 30-42). These pages also contained editorial commentary apparently reflecting the views of the Randolph board members attending the conference. (J.A. 30-42). It is this commentary which Respondents and opposing *amici* have used in an attempt to tar the whole Island Trees Board of Education with a "political" brush. Mr. Martin obtained one of these compendia and subsequently made his own list merely setting forth the names and authors of the books which list he subsequently utilized in ascertaining that eleven of the approximately thirty books listed

were in fact in his district's libraries. (J.A. pp. 22, 24, 101, 102, 105). Subsequently copies of excerpts were made available to parents attending a meeting called to discuss the issue. The comments on the original list from the Randolph School District were deleted. (Ahrens dep. at 19).

To impute the allegedly "political" or "religious" nature of some of the Randolph board's editorializing to the Island Trees board is highly specious especially in view of the fact that two of the books on the original list were restored to the library. (J.A. pp. 75-79). To impute the alleged "political" nature of PONY-U to the board's actions is even more misleading. One can think of no better reason for a local school board member to attend an *educational* conference than on the recommendation of one of his state's twelve highest education officials.

Whatever the nature of PONY-U's motives, any attempt to impute any of its motive ideology to the long subsequent action of a seven member board of education under the circumstances shown by the record as above should be doomed to well deserved failure. It is sad that the Judge writing the plurality opinion in the court below was also unable to make the distinction between clear and unequivocal adoption of another's motives and principles and guilt by minimal association. It is hoped this flawed logic has finally been exposed.

A less integral but equally flawed attack has been made on Petitioners for allegedly permitting PONY-U (or Randolph School District) to be the catalyst for their concern rather than complaints by citizens, students or teachers. (brief of American Publishers Association, et al, p. 9). Apparently only the "professionals", trade journals and "citizens" have a right to bring to a board member's attention potentially objectionable material. Respondents exhibit a total lack of familiarity with the workings of boards of education. Members are (and should be) constantly

attending conferences and symposia given by educationally oriented lay and professional organizations and associations in an effort to expose themselves to the interests, concerns and accomplishments of others. Publishing houses and book sales organizations commonly have representatives and sales materials on hand at these meetings. This should not be a one way street. Nor should it be forgotten that the board members themselves are citizens and taxpayers and, in most cases, have children attending the system's schools.

POINT IV

PETITIONERS NEED NOT FOLLOW NARROWLY DRAWN AND SPECIFIC EDUCATIONAL CRITERIA IN DETERMINING WHETHER TO PROSCRIBE CURRICULAR MATERIALS; THE PROCEDURES FOLLOWED SATISFY THE CONSTITUTION.

Opposing *amici*, American Publishers Association, et al, American Jewish Congress, et al, and New York State United Teachers all contend that the Constitution compels adherence to precisely drawn educational criteria and narrow procedures before curricular materials may be withdrawn by a board. Respondents score the *ad hoc* procedure followed by the Island Trees board as unconstitutional.[4]

Were educational criteria in the narrow sense relating to specific disciplines and testable results necessary the essential concept requiring the transmission of community values by the socialization of the student body to the culture and mores of the immediate school district watershed would be meaningless. Elementary and secondary education deals with more than simply "education". It is an induction into the community and its social and moral attitudes. In order to meet this responsibility school boards must have much greater discretion than that accorded by precise educational criteria.

The suggestion that the constitution requires narrow substantive and procedural guidelines is equally improper and in addition would create a judicially unmanageable and impossible task. Rather than serve the essential purpose of keeping the

[4] *Amicus* NYSUT, the teachers union, goes even further and offers a "solution" to the Court—the requirement of a finding that a material "is both educationally unsound and irrelevant" by a joint committee containing no board members. (at p. 24, 25). Thus would disappear the last remaining vestige of local citizen control of public education. NYSUT has apparently forgotten that "the board is a political body chosen precisely to impose policies on the professional staff". (Tex. L.R., supra, at p. 524).

federal (and state) judiciary out of the day to day operation of the nation's schools such a requirement would provide the basis for a miasmal outbreak of litigation. Our schools have been burdened with a plethora of regulatory requirements to the point of fiscal stress and loss of public support. To add one more in an area of such sensitivity and where precedent does not compel it would wreak havoc.

Amici may have mistaken the student Respondents' rights in the case at bar with the purer expressive rights of students conducting campus publications or with the academic freedom rights surrounding teacher methodology. Even a student in a classroom, the gym or the halls of a school building may be constitutionally disciplined by members of the staff even to the point of brief suspensions as a result of the use of obscenities or vulgarisms without having previously been given a list of proscribed words or actions. The students may not use the language objected to on the school grounds and there is no reason why the board should give the appearance of having endorsed the vulgarity in the proscribed volumes. There is less reason to compel restoration (and endorsement) of the books in question due to lack of a due process type hearing on removal.

Requiring a board to draft and follow narrow precise guidelines regulating the presence of obscenities in library books is an impossible task. Does an eight letter obscenity carry the weight of two four letter ones? Can one board consider language obscene that may be somewhat common in another district? To what extent can obscenity related to the storyline be retained? Is the fact that the material in question could have been written without obscenity relevant? Are scatological obscenities as objectionable as copulative ones? What differentiation is to be made regarding a student's maturity?, etc., etc.

But the task is impossibly complicated when one realizes that

obscenity and vulgarity is just the beginning. If a board has a responsibility to transmit community moral, social and political values this must be accomplished by far more complex efforts than just minimizing vulgarity and obscenity around the schoolhouse and among the curricular materials. Materials must be selected that reflect in many other aspects the cultural, ethical and social mores of the community. If it is discovered that some do not do so it would be ridiculous as well as unlawful to permit the removal of such material only upon compliance with narrowly specific criteria.

The requirement of such criteria in a situation such as is before the Court in the absence of the disciplining of students or staff, where purely expressive conduct is not involved and where such abstract concepts as moral and social values are involved is not constitutionally compelled nor should it be.

POINT V

THE RECORD BELOW IS AMPLY SUFFICIENT TO ENABLE THE RENDERING OF A DECISION UPON THE QUESTIONS PRESENTED WITHOUT THE NEED FOR A PLENARY TRIAL.

As a result of the unusual, but by no means unique, grant of *certiorari* by the Court without a full trial having been held below, and of the call for such a trial in the briefs of opposing *amici*, The National Education Association and the AFL-CIO, et al, such a request should be addressed.

Although the court below in its final decision remanded the cause for trial, apparently in order to ascertain whether Petitioners were politically motivated, two of the three panel judges (Sifton and Mansfield) had sufficient facts before them to enable each to grant summary judgment. It was only Judge Newman who opted for a trial with Judge Sifton joining him so as to assure a plurality.[5] In addition both counsel assured the trial court judge that there were sufficient facts before him to enable him to render a decision and Judge Pratt agreed to and did so.

Petitioners made every effort to annex to the moving papers all materials of any probative value. Respondents had the right of discovery and they deposed the President and Vice President of the board. There was ample time to depose additional members or to counter the affidavits supporting Petitioners' motion. They chose not to no doubt since there truly were sufficient facts before the trial court to enable it to decide the motion and cross motion for summary judgment. In addition both parties submitted lengthy statements pursuant to local Rule 9-g in which all

[5]It is interesting to note that the same panel granted a school district's motion to dismiss a complaint in a companion case where the sole difference was the absence of an allegation regarding the use of the board's "political" values. *Bicknell v. Vergennes Union High School Board of Directors*, 638 F. 2d. 438.

pertinent facts were set forth with little dispute as to them (See J.A. pp. 19, 20, 128-131, 138-145).

If all that is necessary to compel the federal judiciary to grant full blown review is a bare allegation by school students that a board utilized its political as well as social and moral values in arriving at curricular determinations, the courts of our nation will be inundated. Judge Sifton, dissenting in *Bicknell, supra,* did so to give plaintiffs an opportunity "to explore whether the reasons [for proscribing curricular materials] ...were...because of improper ideas they expressed..." (at p. 443). Fishing trips or explorations of this nature should be severely discouraged. If it is thought that there has been an impermissible suppression of ideas let the charge be leveled in the complaint, the 9-g statement or in the cross motion.

Some thought must also be given to the effects of a trial upon the dedicated and community spirited citizens who serve on boards of education. There is no question but that under the lower court's guidelines the trial of this case will be a circus. Petitioners' innermost values will be challenged amid the glare of media exposure. The vulgarity to which they objected will be repeated again and again. No doubt they will be forcefully reminded time and again of the critical acclaim received by the volumes which they in their "ignorance" proscribed. They will be pitted against their own staff and other experts as to their knowledge of English literature, ghetto life, grammar and the society in general of which they are part.[6]

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[6]Proof that the above scenario is not a figment of the writer's imagination is contained in a column from the New York Times of Sunday, September 27, 1981 by Joseph H. Cooper, editorial counsel to the New Yorker, commenting on the case at bar, entitled *If You Ban a Book*. Among others it asked the following questions of "would-be-book-banners:"

> 4. Would you feel comfortable having to elaborate on why you find the material objectionable? Having to explain your motives? What are you prepared to do, go through, and spend to explain and defend your actions?
> 5. Do you like publicity? Notoriety?
> 6. Do you like lawyers? Courtrooms?

There must be and is another way. On balance the constitutional rights asserted by the students are so overweighed by the competing rights and responsibilities of local boards of education that such a scenario cannot be permitted to take place except upon a clear allegation that there has been an impermissible suppression of ideas setting forth the nature of that suppression.

CONCLUSION

The order of the District Court granting summary judgment to Petitioners should be permitted to stand and the order of the Circuit Court of Appeals remanding this cause for trial should be reversed.

Dated: Babylon, New York
February 20, 1982

Respectfully submitted,
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TION FILED
DEC 31 1981

No. 80-2043

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26 *et al.*
Petitioners,

v.

STEVEN A. PICO, ETC. *et al.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND FOR THE AMERICAN FEDERATION OF TEACHERS, AFL-CIO, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND BY THE AMERICAN FEDERATION OF TEACHERS, AFL-CIO

The American Federation of Labor and Congress of Industrial Organizations and the American Federation of Teachers, AFL-CIO, respectfully move this Court for leave to file the accompanying brief *amici curiae* in support of the position of the respondents in this case.

The AFL-CIO is a federation of 102 national and international unions having a total membership of 14,500,-

000 working men and women. The American Federation of Teachers is the representative of over 500,000 of those men and women, the majority of whom are employed at schools and other educational institutions.

This case raises novel and important issues concerning the application of the First Amendment to the schools. The American Federation of Teachers in particular and the labor movement in general have long been dedicated to advancing the cause of public education as the preeminent means of advancing our democracy and our endeavor to achieve a civilized, harmonious and prosperous society. The question presented here as to the power of school boards to limit the role of the schools as the site of free inquiry goes to the very essence of the educational enterprise in this Nation. The AFL-CIO and the American Federation of Teachers therefore seek this opportunity to express their views on that question.

CONCLUSION

For the above stated reasons this motion for leave to file a brief *amici curiae* should be granted.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND FOR THE AMERICAN FEDERATION OF TEACHERS, AFL-CIO, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

This brief *amici curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amici curiae* in this case is set forth in that motion.

ARGUMENT

The following question is, we believe, the only one before this Court for decision: Are there *any* factual circumstances which would support a claim that removal of books from a secondary school library on the basis that their content is somehow objectionable for secondary students violates the First Amendment rights of the objecting students?

We formulate the question presented in that fashion for two reasons. The first is the procedural posture of the case. This matter comes to this Court from a court of appeals decision reversing a grant of summary judgment in favor of defendants (hereafter "the School Board") and remanding for trial. Pet. App. 33. The district court had granted summary judgment on the basis that, except, perhaps, for religious grounds, school officials may remove books from school libraries "'for whatever reason'" without implicating First Amendment concerns. Pet. App. A-10. Indeed, only such an absolutist legal theory could properly support a grant of summary judgment. As Judge Newman's concurring opinion in the court of appeals ably demonstrates, there was a conflict in the evidence as to the *reason* the books were removed; with substantial evidence tending to support plaintiffs' allegations that the School Board acted to advance certain political views. Pet. App. A-75-77, A-79.[1]

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[1] The School Board has argued that its action was based on its view that the removed books contain unacceptably vulgar language and overly explicit sexual references. Pet. App. A-55. We note that the selection which at least in part caused the removal of "A Reader for Writers"—Jonathan Swift's *A Modest Proposal for Preventing the Children of Poor People in Ireland from Being a Burden to their Parents or Country*—in keeping with eighteenth-century English diction does not use "vulgar" words or descriptions presaging *Lady Chatterley's Lover*. Moreover, the *Modest Proposal* has been read for generations as the preeminent example in the language of the use of irony as a literary device for conveying political and social views. That the essay was banned in the

And the generally high literary stature of the books removed, as well as the circumstances of their removal (see Pet. App. A-16-18; A-27-29), make it plain that judgment could be entered for the School Board only if school boards may remove *any* book from the shelves of *any* secondary school library for *any* reason through *any* irregular procedure and with *any* sort of accompanying publicity.

There is a second related reason for viewing the question for decision here as similar to one arising on a motion to dismiss for failure to state a claim. The question whether and under what circumstances school boards

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apparent belief that it in fact advocates child-slaughter is itself an irony; Swift, of course, assumed that no literate person would so read his work, but rather that all would understand that his purpose was precisely by conveying the abhorence of such a plan to condemn the policy of the English government toward Ireland.

Further, even if it is assumed that the Board's avowed reason was the animating consideration and that some uses of language short of actual obscenity would justify total exclusion from a high school library (see *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 742 *et seq.*)—a question upon which we express no view except to note that the key considerations in *Pacifica*, the nature of the medium and the possibility that "children . . . too young to read" will be affected (*id.* at 725-726, *id.* at 757-758 Powell, J., concurring), are not here present—those two circumstances would not, as Judge Mansfield suggested below, justify summary judgment. To paraphrase the plurality opinion in *Pacifica* "[i]f there were any reason to believe that the [School Board's] characterization of the [books] as offensive could be traced to [their] political content—First Amendment protection might be required." *Id.* at 746; *see also Mount Healthy School District* v. *Doyle*, 429 U.S. 274. The question whether any or all of these books would have been excised absent objection to their ideas, as understood or misunderstood by the members of the School Board, is one which the documentary evidence elicited upon summary judgment is entirely inadequate to resolve. In particular, it would be relevant to this question to know whether or not other books with similar language were left on the shelves after the purge; if so, as Judge Newman recognized "the inference will be strengthened that vulgarity was the excuse, not the reason, for book removal." Pet. App. A-76.

may excise books of recognized literary value from secondary school libraries is one of increasing contemporary concern. *See, e.g.*, New York Times, December 13, 1981, Book Review Section, p. 1. Moreover, this Court's First Amendment decisions concerning the educational offerings of public schools, as opposed to the right of the students themselves to speak or refrain from speaking, have turned on Religion Clause objections. *Epperson* v. *Arkansas*, 393 U.S. 97; *Abington Township* v. *Schempp*, 374 U.S. 203; *Engel* v. *Vitale*, 370 U.S. 421; *Stone* v. *Graham*, 449 U.S. 39. The Court has *never* addressed directly questions concerning the shaping of library collections generally, or of those of school libraries particularly. Further, the problem in this case implicates several nascent strains of general First Amendment doctrine, among them the tailoring of First Amendment principles to governmental action affecting juveniles (*e.g. Pacifica Foundation, supra*; *Tinker* v. *Des Moines School District*, 393 U.S. 503), and the application of the general proscription against content-based discrimination to situations in which governmental control of a means of communication may be deemed to justify differentiations based on content (see *Widmar* v. *Vincent*, —— U.S. ——, 50 L.W. 4062, 4066 (Dec. 8, 1981) (Stevens, J. concurring).

The circumstances just canvassed counsel caution in constitutional adjudication. *See, e.g. Rescue Army* v. *Municipal Court*, 331 U.S. 549. Indeed, in the brief in opposition to the petition for a writ of certiorari ("Opp. Br."), respondents, based their opposition precisely on the ground that "sound and responsible constitutional adjudication can only profit from a full and fair exposition of the factual ingredient to the controversy." Opp. Br. at 17, citing such cases as *Rescue Army* and *Minnick* v. *California Department of Corrections*, —— U.S. ——, 49 L.W. 4609 (June 1, 1981). In support of this argument against hearing the case at this time, respondents suggested eight categories of evidence that

might be developed at trial and that might well be relevant *if* a line between constitutional and unconstitutional library book removals in the school context were to be drawn. *Id.* at 11 n.*. By granting the writ, this Court evidently decided that despite the absence of such potentially relevant material from the record, the case in its present posture presents a major threshold constitutional question with sufficient clarity to merit this Court's first intervention in this sensitive area. That question, we submit, is whether the role of school boards in running school libraries is such that the First Amendment has *no* application whatever to the decisions made with respect to those libraries. It is to that question that this brief is addressed.

A

This case is not one which can be usefully approached on the basis of slogans. It is of no aid to analysis of the issue at hand to proclaim that a "principal function of all elementary and secondary education is indoctrinative" (*James* v. *Board of Education*, 461 F.2d 566, 573 (2nd Cir. 1972), *quoted* in appellants' brief (hereafter "App. Br.") at 16), or that "the concept of a book acquiring tenure by shelving is indeed novel . . . under any theory of constitutional law. . ." (*Presidents Council, District 25* v. *Community School Board*, 457 F.2d 289, 293 (2nd Cir.), *cert. denied*, 409 U.S. 998, (1972), quoted by Judge Mansfield in this case, (Pet. App. A-64). While these aphorisms have about them a nice ring as well as an element of truth, in the end they are as inadequate as doctrine as regards the issue presented here as Justice Holmes' pithy formulation—"The petitioner may have a constitutional right to talk politics but he has no constitutional right to be a policeman" (*McAuliffe* v. *New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 518)—proved to be with respect to the question whether a public employee may be discharged because of an exercise of First Amendment rights. *See, e.g., Garrity* v. *New Jersey*, 385 U.S. 493, 499-500; *Keyishian* v. *Board of Regents*, 385

U.S. 589, 605-606. Just as his approach—which to a large degree paralyzed thinking with regard to the question it addressed for two generations—erred essentially by putting the question the wrong way around, so do the mottoes recited here on behalf of an unbounded power of school officials to purge the library shelves.

To say that schools have an "indoctrinative" function, for example, simply means, to the extent that it is valid and useful observation, that the very purpose of education, and the reason which justifies compulsory education laws, is to communicate to the young the knowledge, ideas, and modes of thinking which have been developed in the past; there is nothing inherent in the function of schools, however, which requires that the educational authorities be allowed to "indoctrinate" by any means whatever or on any subject whatever, and this Court has rejected the view that there is such a sweeping authority. *Epperson* v. *Arkansas*, *supra*; *Board of Education* v. *Barnette*, 319 U.S. 624, 631. Thus, in *Barnette* the Court recognized that "the state may 'require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guarantees of civil liberty, which tend to inspire patriotism and love of country.'" *Id.* at 631, *quoting Minersville School District* v. *Gobitis*, 310 U.S. 586, 604 (Stone, J., dissenting). But the *Barnette* Court rejected the view that the appropriateness of the goal of "inspir-[ing] patriotism and love of country" insulated from constitutional scrutiny means of doing so in no way typical of or essential to the educational process:

> Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here in whether this slow and easily neglected route to aroused loyalties may be shortcut by substituting a compulsory salute and slogan. [*Id.* at 63.]

Barnette, to be sure, concerned government compulsion of speech by the students themselves. Moreover, since the flag salute was not claimed to have educational value in the sense of developing analytic faculties or communicating knowledge (*id.* at 624 n. 12), ideological conformity was the only possible purpose of the exercise. And the Court, as noted, made explicit that its ruling did not embrace attempts to inculcate patriotism through reasoned discussion rather than compulsion. Further, we are certain that the Court did not mean to suggest that *any* enforced recitation in a school is beyond the powers of school officials; surely, the requirement that each student in a class memorize and recite a poem by a nineteenth century American poet, or the "eight times" table, would not implicate the fundamental values eloquently explicated in *Barnette*.

Thus, *Barnette* does not state an entire ruling body of law but rather a limiting principle of critical importance to, although far from dispositive of, this case—*viz.*, that the so-called "indoctrinative" function of a school does not sanction *any and all* means toward the goal of inculcating political, social, or moral values, even if those same means would be appropriate where the central educational functions of communicating knowledge and analytical methods are involved.

Similarly, the notion that books lack "tenure" is certainly true in one sense but, like the "indictrination" statement, in a more fundamental sense simply begs the question before the Court. Of course *books* have no "tenure", constitutional or otherwise—but that is because the First Amendment protects *people*, not books. Compare *Katz* v. *United States*, 399 U.S. 347, 351. And even as the "effort to decide whether a given 'area' . . . is 'constitutionally protected' deflect[ed] attention from the problem presented by" *Katz*, (*id.*), so the "tenure" slogan on which the School Board essentially predicates its case diverts attention from the true issue here—the scope of

the "First Amendment right [of the students] to 'receive information and ideas' " (*Kleindienst* v. *Mandel*, 408 U.S. 753, 762 and cases cited *id.* at 763). As the Court also said in *Kleindienst*: "This Court has recognized that this right is 'nowhere more vital' than in our schools and universities." *Id.* at 763.[2]

B

There is no doubt that if a municipality determined to bar from sale or distribution within its borders the books here at issue on the ground that the ideas conveyed were possibly offensive to some—or most—of its citizens the First Amendment would be violated. Where the government as regulator attempts to stifle the communication of ideas on the basis of the viewpoint taken by the speaker, the very core values underlying the First Amendment are implicated. "[A]bove all else, the First Amendment means that government has no power to

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[2] Again it is true, of course, that neither books nor, more aptly, the students whose access to them has been purposely impeded acquire any manner of *property* rights—the constitutionally significant aspect of the "tenure" concept—by the fact that those writings have been on the shelves for a day, a year, or five years. The procedural due process rights which pertain when, by beneficence or otherwise, the government creates a property interest (*see, e.g., Goldberg* v. *Kelly*, 397 U.S. 254; *Slochower* v. *Board of Education*, 350 U.S. 551; *cf. Board of Regents* v. *Roth*, 408 U.S. 564, 576-78), certainly have no application here. But the First Amendment restrains the Government's hand in removing government-bestowed benefits or opportunities from people even when there are *no* property rights in those benefits or opportunities. *E.g., Pickering* v. *Board of Education*, 391 U.S. 563; *Keyishian* v. *Board of Regents*, *supra*; *Shelton* v. *Tucker*, 364 U.S. 479. Since this is a First Amendment case it is therefore no answer to the questions raised here that shelved books as such lack property rights. Rather, the problem in this case is whether in the particular situation of purging books from school libraries because of their content, the First Amendment limits the power of school officials to systematically restrict access of the students to certain points of view.

restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95 and cases cited *id.* The foregoing was most recently quoted approvingly in *Consolidated Edison* v. *Public Serv. Comm'n.*, 447 U.S. 530, 537. While this Court has in a few instances in recent years sanctioned limited government regulation of private expression based on its gross tastelessness (*Young* v. *American Mine Theaters*, 427 U.S. 50; *Pacifica Foundation, supra*), *Central Hudson's* reaffirmation of *Mosley* demonstrates that the Court has also remained absolutely steadfast in its insistence that suppression of communication because of disagreement with the ideas expressed has no place whatsoever in our constitutional scheme.

C

Governmental entities do not affect "the marketplace of ideas" solely in their role as regulators of private expression. Governments, and government officials, also communicate on their own behalf with members of the populace; for example, the United States publishes all manner of material for general distribution. Also, governments—federal, state and local—control property which, while not principally used for communicative activity is a natural focus for such activity. In regulating access to such property, the government necessarily affects the opportunity for communication. See *e.g.*, *Hague* v. *C.I.O.*, 307 U.S. 496; *Mosley, supra.* And finally, these governments often create and subsidize opportunities for communication between private individuals. By determining who may benefit from that opportunity, the government once again is affecting private individuals' ability to communicate. *E.g., Southeastern Promotions* v. *Conrad*, 420 U.S. 546 (municipal auditorium); *City of Madison* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167 (public meeting); *Widmar* v. *Vincent, supra* (university facilities).

The dominant point of the First Amendment is to prohibit government abridgements of the people's speech not to restrain government speech. That Amendment's free speech protection contains no equivalent of the Establishment Clause.[3] It could hardly be otherwise if the government and government officials are to take part in the national dialogue. Speech is not a random activity. The speaker to be coherent must make choices as to subject matter, point of view, emphasis and style at every juncture. A constitutional rule that when the government speaks it must do so without making such distinctions would be a gag rule.

For this case, the significance of the limits of the First Amendment's application (particularly application of its content, and its point-of-view, proscriptions) to the government-as-speaker is that the problem of school board control over prescribed classroom curriculum can be put to one side. For the most part, the role of the elected school officials in determining what students are to learn and teachers to teach appears analogous to other situations in which the government exercises a granted power to engage in communicative activity. The substantial differences which we can surmize and which may be of constitutional significance in some instances are: first, that the persons being addressed in elementary and secondary

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[3] This is not to say that other clauses of the Constitution may not limit the government as speaker. For example, we believe that the use of governmental funds or facilities to further one side in a partisan political context would implicate the Equal Protection Clause. *Cf. Buckley* v. *Valeo*, 424 U.S. 1, 97-99 where the Court treated in depth the contention that federal public financing of political elections and conventions violates the due process clause of the Fifth Amendment by excluding certain minor party candidates. The Thirteenth and Fourteenth amendments would provide an independent constitutional proscription against a government campaign in favor of discrimination against blacks. See *Anderson* v. *Martin*, 375 U.S. 399. There may also be instances in which the government's manner of communicating its views become so intrusive as to violate privacy interests protected by the First or Fifth Amendments. *Cf. Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451, 463-466.

schools are for the most part minors, so that situations of conflict with parental rights to raise their children could arise; and second, that attendance is compulsory, a circumstance which might raise constitutional questions if the curriculum prescribed bore little relationship to the general purposes which justify such a deprivation of child and parent liberty as compulsory school attendance represents. See e.g. *Meyer* v. *Nebraska*, 262 U.S. 390; *Pierce* v. *Sisters*; 268 U.S. 510; *Wisconsin* v. *Yoder*, 406 U.S. 205.[4]

The recognition that the First Amendment has a relatively restricted role to play with regard to government expression overall, and may therefore place few limits upon the particular form of government communication in the classroom envisioned by the communities of this nation when they create public schools, does not sanction everything schools do, in the name of education or otherwise. Rather, schools also provide the setting for communication among students, and among students and members of the outside community. For example, schools like universities, may provide facilities for student extracurricular activities and for meetings of, and performances by, members of the public. In fostering such communicative activities, school boards are performing an important and useful function but one that is different in kind from engaging directly in speech. See *Widmar*, *supra*.

It is our view that a school library is appropriately viewed as one aspect of this latter function. In estab-

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[4] Thus, if high school students were taught no mathematics, science, or history but were simply required to sit all day listening to patriotic speech, we would assume that the Due Process Clause, if not the First Amendment, would be violated. Like constitutional questions would be raised by the reported example of "a western state legislature, [which] exasperated by the pertinacity of mathematicians, once passed a law that *pi*, or the relation of the diameter to the circumference of the circle, should thereafter in the schools of the state be reckoned 3 1/7." Howard Mumford Jone (ed.) *Primer of Intellectual Freedom*, p. xi, (Cambridge, Mass., 1949). *See* discussion of *Barnette*, at p. —, *supra*.

lishing a library, a school is in effect providing a relatively unstructured means for students to engage in a form of communication with individuals, past and present, who have committed their thoughts to paper.[5] The question then becomes whether and, if so, within what parameters the First Amendment cabins a governmental entity engaged in such communication-fostering activity with respect to content discrimination generally and to point-of-view differentiation particularly.

D

The law regarding access to governmental facilities such as streets, and parks that are natural public forums but are not dedicated solely to communicative activity is well settled; *any* form of content discrimination is necessarily suspect and therefore subject to full First Amendment scrutiny. E.g. *Mosley, supra.* In making allocation decisions with respect to such locations the government ordinarily has no *legitimate* interest, relating to the proper functioning of the facility, in distinguishing among points of view, or, more generally, among issues or subject matter. And, while there *are* in such situations weighty governmental interests in preserving order, the very fact that the government has made content differentiations is usually sufficient to demonstrate that such interests are *not* at stake, since the expression permitted may be as likely to cause the harm supposedly addressed as that included in any proscription. Thus, the reasons why "[s]elective exclusions from a public forum may not be based on content alone and may not

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[5] One point of the libary may be to provide the resources that compliment and supplement the school's classroom curriculum. Certainly then in acquiring books such congruence is a factor fairly to be taken into account and we do not mean to imply otherwise. See also p. — *infra.* But a library is not the functional equivalent of a classroom in which a teacher meets with a class to canvass a stated subject and that subject alone and to do so in a manner permitting only one person at a time to be heard. For a storehouse of books permits a series of parallel intellectual efforts to be initiated at any moment, none of which interfere with the other.

be justified by reference to content alone" (*Mosley, supra.* 408 U.S. at 96), is that, upon analysis, the government has no different or greater interest in point-of-view or content differentiation in such circumstances then when it is regulating private speech directly.

The situation appears to us to be quite different with respect to communication-fostering governmental locations and occasions, a. to which the law is considerably less well developed. Initially a government entity may define the function or purpose of such a location or occasion in a way which *does* make some form of content differentiation appropriate if that function is to be served. For example, at public meetings, relevance to the subject matter of the meeting is surely an essential criteria if the meeting is to go forward in a rational fashion. *Cf. City of Madison, supra.* Also, it is the norm that scarcity of resources will necessitate that choices be made among competing publications, performances or displays. When this is the case the application of such content-oriented preferences as a concentration upon pre-1950 plays, a preference for scientific publications as opposed to musical ones, or a choice of a certain book rather than another because of the critical acclaim the former has received may well be perfectly in keeping with—indeed may well be essential to—the overall object of enhancing communication.

There is no reason to suppose that the Constitution requires a first-come, first-served approach to the use of scarce governmental resources in a communication-fostering endeavor even though attention to such considerations as relevance, quality, and community needs, would appear far more likely than not to improve the performance of the enterprise as a service to the populace. We therefore believe that there is no rigid proscription upon content based determinations generally by public libraries or by school libraries, for the result would be to undermine the ability to provide a community resource which is in itself an embodiment of the underlying values of the First Amendment.

Nor, as this Court has made clear, is there any reason to suppose that this mode of governmental activity is entirely free from the strictures of the First Amendment. *Southeastern Promotions, supra*, establishes the point we believe to be critical to the outcome of this case—where there is no showing that the particular decision under review that limits one form of expression was made to permit another form of expression, there is no basis for treating communication-fostering governmental activities in a special fashion. The *Southeastern Promotions* Court began:

> There was no contention by the Board that these facilities could not accommodate a production of [the] size [of the musical "Hair"] . . . petitioner was not seeking to use a facility primarily serving a competing use . . . nor was rejection of the application related to . . . . applications from other users. [420 U.S. at 555.]

Under these circumstances, the Court regarded the city's action in denying the application as "indistinguishable in its censoring effect from the official actions consistently identified as prior restraints in a long line of this Court's decisions." *Id.* at 552.[6]

We would apply the *Southeastern Promotions* mode analysis to this case as follows: As to libraries generally, and school libraries particularly, many types of content-based determinations are necessary to the proper functioning of the institution. For this reason, book selection decisions ought generally to be immune from

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[6] Similarly, in the *Widmar supra*, there was the possibility, noted by the concurrence, that competing applications for use of university facilities by student groups could justify content-based distinctions designed to foster the overall purposes of the university. 50 L.W. 4066-67 (Stevens, J. concurring). But it was clear that such considerations had not influenced the decision to deny use to the complaining group. *Id.* at 4064-4065. Consequently, the Court, citing *Mosley, supra*, applied the standard pertinent to the public forum situation. 50 L.W. at 4066.

the broad First Amendment proscription against subject-matter differentiation. Point-of-view discrimination, however, might call for a different result. At least in the public library situations, in which didactic purposes are not central, and possibly with respect to school libraries as well, acquisition policies which elevate a particular viewpoint into an orthodoxy and seek overall uniformity of doctrine within the library as whole, might, upon complete examination, be found to be unjustified by any sufficient governmental interest. Even as to such discrimination, however, judicial intervention should be limited; otherwise censorship of another sort could be introduced, as librarians and other decision makers submerge their own best judgment to the fear of litigation.

Removal of a shelved book because its content is deemed objectionable, however, does *not* implicate the special considerations commanding that communication-fostering governmental entities be permitted to engage in content-based differentiation. There may be nothing in the circumstances suggesting the need for any decision about particular books whatever, content-based, viewpoint based, or otherwise. And, the removal may turn out to be, as it was alleged to be in this case, for the precise purpose of discouraging communication between the students and certain authors because the authors' ideas are out of favor with the authorities. At that juncture, we believe the action becomes "indistinguishable in its censoring effect from the official actions consistently identified as prior restraints . . ." (*Southeast Promotions, supra*, 420 U.S. at 552) and therefore as violative of the First Amendment.

CONCLUSION

As we noted at the outset, the sole issue before this Court is whether the actions of school officials in removing books from libraries are free of all First Amendment restraints. For the reasons we have developed,

we believe that there are First Amendment restrictions upon such action, although the precise perameters of such restrictions remain to be developed. Consequently, the judgment of the court of appeals must be affirmed and the case remanded for trial. After that trial will be the appropriate time for the elaboration of more precise constitutional rules.

Respectfully submitted,

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No. 80-2043

Office - Supreme Court, U.S.
FILED
DEC 31 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT No. 26; RICHARD AHRENS; FRANK MARTIN; CHRISTINA FASULO; PATRICK HUGHES; RICHARD MELCHERS; RICHARD MICHAELS; and LOUIS NESSIM,

Petitioners,

against

STEVEN A. PICO, by his next friend, FRANCES PICO; JACQUELINE GOLD, by her next friend, RONA GOLD; RUSSELL RIEGER, by his next friend, SAMUEL RIEGER; GLENN YARRIS, by his next friend, RICHARD YARRIS and PAUL SOCHINSKI, by his next friend, HENRY SOCHINSKI,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE AMERICAN JEWISH CONGRESS; THE AMERICAN JEWISH COMMITTEE; THE AMERICAN ETHICAL UNION; THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION; THE ETHICAL HUMANIST SOCIETY OF LONG ISLAND; THE LONG ISLAND COUNCIL OF CHURCHES; THE NATIONAL COUNCIL OF JEWISH WOMEN; THE NATIONAL COUNCIL OF TEACHERS OF ENGLISH; THE OFFICE OF COMMUNICATION, UNITED CHURCH OF CHRIST; THE PILGRIM PRESS, UNITED CHURCH BOARD FOR HOMELAND MINISTRIES; THE SPEECH COMMUNICATION ASSOCIATION; THE STUDENT PRESS LAW CENTER; THE UNION OF AMERICAN HEBREW CONGREGATIONS; and THE UNITARIAN UNIVERSALIST ASSOCIATION; *AMICI CURIAE*

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INTEREST OF THE AMICI

This brief amicus curiae in support of the Respondents is submitted with the consent of the parties. The interests of the amici in this case are as follows:

The American Jewish Committee and The American Jewish Congress were founded in 1906 and 1918, respectively. Both are national organizations concerned with the preservation and security of the constitutional rights of American Jews. Both believe that the preservation of such rights can be secured only through the preservation of the rights of all Americans.

The American Ethical Union, a federation of Ethical Humanist Societies, founded in 1966, is concerned

with the constitutional rights of all Americans. It is deeply concerned with the freedoms granted under the First Amendment and in particular, with the freedom to teach and the freedom to read.

The Americal Orthopsychiatric Association is a national, educational, professional membership association that brings together in a collaborative effort behavioral, medical and social scientists in the study and treatment of problems of human behavior. The Association joins in this brief based on its mental health concerns about the issue at stake. These concerns are primarily related to the fact that a basic ingredient of developmental health for children is freedom to learn, explore and discover. If this

freedom is inhibited by narrow and prohibitive action, there will be interference in the maturation process.

The Ethical Humanist Society of Long Island is a humanist religious fellowship that is deeply concerned with First Amendment freedoms in general and academic freedom in particular.

The Long Island Council of Churches is a Christian mission ecumenical organization concerned about freedom of speech, human rights, aid to the poor, needy and outcast. It seeks to protect the right of free choice with responsible efforts to provide a wide range of means enabling all to evaluate and understand the diversity of our culture under one God.

The National Council of Jewish Women is a volunteer organization, dedicated in the spirit of Judaism to advancing human welfare and the democratic way of life. It believes that the freedom, dignity, and security of the individual are basic to American democracy, that individual liberties and rights guaranteed by the Constitution are keystones of a free society, and that any erosion of these liberties undermines that society.

Founded in 1911, the National Council of Teachers of English with nearly 80,000 members and subscribers focuses on the major concerns of teachers of English and the language arts. Through conferences and publications, it provides

the profession with a forum for the exchange of ideas with the intent of improving the status of the profession. NCTE's interest in the case rests in its belief that students' freedom to read is an essential element in developing free human beings who can learn and develop successful survival strategies for the world in which we live.

The Office of Communication of United Church of Christ is the national instrumentality of the United Church of Christ charged by the church constitution to conduct a ministry in the mass media. The Office of Communication traditionally has engaged in legal and educational work which upholds First Amendment principles of free speech and press. The interest of the Office in this case stems

directly from its other First Amendment activities and is based on the significance of the particular issues in the case.

The United Church Board for Homeland Ministries is the organization recognized by the United Church of Christ as the instrumentality charged with the responsibility for carrying out that denomination's homeland mission. Among its activities is the conduct of a publication division, The Pilgrim Press. It is concerned with the preservation of First Amendment rights, particularly with respect to freedom of speech issues.

The Speech Communication Association, founded in 1914, is a non-profit educational organization of some 5,000 members. The Association's purpose is to promote study, criticism, research, teaching and application of the artistic, humanistic, and scientific principles of communication, particularly speech communication. Maters relating to the First Amendment have been of long-standing concern to the Association and its Commission on Fredom of Speech.

The Student Press Law Center is a national non-profit organization which provides legal advice and representation to student journalists facing censorship problems. The Center is committed to the value of the First Amendment rights of all students and believes that the

subjection of students to irrational regulation of ideas and information undermines their First Amendment freedoms.

The Union of American Hebrew Congregations is the central body of Reform Judaism, representing 750 Reform synagogues comprising 1,300,000 individual Jews. It is committed to the protection of First Amendment rights and joins in this brief because it believes that school book censorship, under the circumstances of this case, directly threatens Constitutionally-protected rights.

The Unitarian Universalist Association, an association of churches and fellowships in the United States and Canada, is dedicated to the freedoms

guaranteed by the First Amendment, including freedom to teach and freedom to read.

Statement of the Case

Plaintiffs-respondents, four high school students and one junior high school student, brought suit in state court against the defendants-petitioners Board of Education of the Island Trees Union Free School District and its members [the Board]. Suing on behalf of all junior and senior public high school students in the district and seeking declaratory and injunctive relief, they challenged the Board's removal of nine books from the libraries and curricula of the district's schools, claiming that the removal was in violation of the United States and New York Constitutions and of 42 U.S.C. §1983.

Defendants-petitioners removed the action to the United States District

Court for the Eastern District of New York, which thereafter denied a motion for remand. Prior to discovery, defendants-petitioners moved for summary judgment. The students cross-moved for summary judgment and for certification of the plaintiff class.

By memorandum opinion and order dated August 2, 1979, the Honorable George C. Pratt denied the students' motions and granted summary judgment in favor of the Board. Pico v. Board of Education, Island Trees Union Free School District, 474 F. Supp. 387 (E.D. N.Y. 1979). Apparently viewing itself bound by Presidents Council v. Community School Board, 457 F.2d 289 (2d Cir.), cert. denied, 409 U.S. 998 (1972), the district

court, finding no sharp, focused issue of academic freedom, and giving deference to the school board's traditional control over educational content, ruled that "the First Amendment [does] not preclude a school board from removing books which its members find to be inconsistent with the basic values of the community." The students appealed.

The Court of Appeals for the Second Circuit reversed and remanded the case for trial. Pico v. Board of Education, Island Trees Union Free School District No. 26, 638 F.2d 404 (2d Cir. 1980). Although the judges of the Court of Appeals characterized the facts differently, and drew different inferences from them, the basic facts of the case, set forth in their opinions,

are largely undisputed.

In September 1975, the president, vice-president and one other member of the school board attended a conference sponsored by an organization called Parents of New York - United (PONY-U), a self-proclaimed "conservative" group. At the meeting, a list of 32 books deemed objectionable by PONY-U was distributed, together with excerpts from those books -- in some cases, mere words and phrases -- which PONY-U deemed particularly offensive.

In November, the Board's president and vice-president, having gained entry to the high school library with the assistance of a custodian, searched the library's card catalogue and discovered that nine of the books which PONY-U

considered objectionable were included in the library's collection. The books were The Naked Ape, by Desmond Morris; Down These Mean Streets, by Piri Thomas; Black Boy, by Richard Wright; Soul on Ice, by Eldrige Cleaver; A Hero Ain't Nothing But a Sandwich, by Alice Childress; Laughing Boy, by Oliver LaFarge; Go Ask Alice, (Anonymous); Slaughter House Five, by Kurt Vonnegut, Jr.; and Best Short Stories by Negro Writers, edited by Langston Hughes. A tenth book disapproved by PONY-U, A Reader for Writers, edited by Jerome Archer, was found in the junior high school library, and another, Bernard Malamud's The Fixer, was found to be in the high school curriculum.

In February 1976, at a private

session of the Board, the Board gave an unofficial direction that the 11 objectionable books be removed from the school libraries. The books were removed from the libraries and delivered to the Board's office. Feeling compelled to justify these actions, the Board, on March 19, 1976, issued a press release, stating that the books had been removed after it had come to the Board's attention that there were books in use in the nation's schools which were "anti-American, anti-Christian, anti-Semetic (sic), and just plain filthy." The release stated that the Board was in the process of reviewing the contents of the books, but had already found that

> the books, do, in fact, contain

> material which is offensive to Christians, Jews, Blacks and Americans in general. In addition, these books contain obscenities, blasphemies, brutality and perversion beyond description.

On March 30, 1976, the Board ratified the prior transfer of the books from the libraries to the Board office. At that meeting, the Board also appointed a Book Review Committee and charged it with the responsibility for making recommendations to the Board with respect to the disposition of the books in question. The committee was directed to evaluate the books with reference to four criteria: their educational suitability; good taste; relevance; and appropriateness to age and grade level.

The committee recommended that two of the books, The Naked Ape and Down

These Mean Streets, be removed from the school library. It recommended that five of the books be returned to the library -- Laughing Boy, Black Boy, Go Ask Alice, Best Short Stories by Negro Writers, and Slaughter House Five -- the last one with access conditioned on parental approval. The committee made no recommendations with respect to the remaining books, its members having been unable to read one of them, A Reader for Writers, and unable to reach agreement on two, Soul on Ice and A Hero Ain't Nothing but a Sandwich.

On July 2, 1976, in disregard of the committee's recommendations, the Board decided to restore only one book, Laughing Boy, to the school library and to return one, Black Boy, with access conditioned on parental approval. The

Board decided that all of the remaining nine books should be removed from elementary and secondary libraries and from use in the curriculum. The Board's president, by affidavit prepared for this litigation, stated that his

> objection is to the obscenity and bad taste contained in [the books] as well as to their irrelevance, in [his] opinion to the basic curriculum of the district and to the values which [he], as a board member and president, feels the community wishes inculcated in its youth.

His affidavit further stated that he is a conservative in his general philosophy, that he feels that the community he represents shares that philosophy, and that the validity of his feelings has been confirmed by the fact that he has been re-elected to the Board. His affidavit recited:

> I feel that this is complete vindication for and support of our stand concerning these books.

The Board's vice-president, by affidavit, made similar assertions. His affidavit stated:

> I subscribe to a basically conservative philosophy, especially with regard to fiscal matters, morals and the place of education in our society. I feel that my six fellow board members feel the same way and ... that this is representative of our community.

In the Court of Appeals each of the panel's three judges wrote separately. In Judge Sifton's view, the students were entitled to summary judgment.

> [W]e are presented with more than the inferences to be drawn from

> the act of removing controversial texts from library shelves, and more than the clearly understood, routine and regular task of selecting titles for a school library. What we have instead is an unusual and irregular intervention in the school libraries' operations by persons not routinely concerned with such matters. Moreover, this intervention has occurred under circumstances, including the explanations for their actions given by the participants, which so far from clarifying the scope and intentions behind the official action, create instead grave questions concerning both subjects.

638 F.2d at 414.

In Judge Mansfield's view, the district court's grant of summary judgment to defendants was proper.

> [T]he Board acted on rational and specific grounds relevant to the education and welfare of the school children within its jurisdiction, and it did so fairly and conscientiously. It discontinued the handful of books because all but one contain either vulgar and

indecent language, profanities, explicit sex, sexual perversion, poor grammar, glorification of sex and drugs, or anti-Jewish, anti-Black, or anti-Christian remarks ....

The Board's action does not hinder or destroy anybody's rights of free expression. The Board did not seek to inculcate students with any particular social or political views (e.g., legalized abortion or anti-abortion, adherence to the views of any political party or religion, promotion of the Equal Rights Amendment or the like). No free exchange of ideas was suppressed. No one was imposing views, whether labelled "orthodox" or otherwise, on anybody else. No one has been or will be disciplined as a result of the removal of the books. Nor will anyone be denied an education in line with basic community values. Both parties agree that teachers and students are free to discuss and comment on the themes and ideas of the books in class or on school premises. Students may also be able to purchase the books outside of school or borrow them from a public library. In short there are no First Amendment or

> other constitutional interests at stake ....

638 F.2d at 427-28.

In Judge Newman's view, neither side was entitled to summary judgment; a trial would be necessary to resolve disputed issues of fact.

> [P]laintiffs have alleged that the removal of books from the Island Trees School library was motivated in part by the School Board's objection to the political views expressed in those books. The complaint further alleges that this politically motivated action was taken under circumstances that pose a threat to the free expression and exchange of ideas within the school community that is protected by the First Amendment. In opposing the defendants' motion for summary judgment, the plaintiffs have submitted substantial evidence to support their claim. A trial is required to determine precisely what happened, why it happened, and whether, in the circumstances of this case, the School Board's actions, looking forward from the time they were taken, created a

> sufficient risk of suppressing ideas to constitute a violation of the First Amendment.

638 F.2d at 438.

Because the majority of the panel had determined that the district court's grant of summary judgment was improper, that ruling was reversed and the case was remanded.

A petition for rehearing and for consideration en banc was denied. Pico v. Board of Education, Island Trees Union Free School District No. 26, 646 F.2d 714 (2d Cir. 1980). The Board's petition for certiorari was granted by this Court on October 13, 1981.

SUMMARY OF ARGUMENT

School boards, like other arms of the state, are subject to constitutional constraints. Because the Constitution protects the right to receive information and ideas, and in light of the role which public schools play in American life, decisions as to the content of school curricula and library collections must be premised on educational criteria, and not on the ideological, political, or religious values of school board members. The facts establish that the decision to ban the books at issue here was based not on the former, but on the latter. Accordingly, that decision cannot stand.

The decision cannot stand for another reason as well. The First Amendment demands that the state's

restriction of expression, even in the "special" public school context, be based on narrowly drawn regulations which serve legitimate operational goals. The decision to ban the books was made either without reference to any articulated guidelines or to guidelines which were themselves unconstitutionally vague. For this reason as well, the Board's decision was constitutionally infirm.

ARGUMENT

I. THE EXCLUSION OF BOOKS FROM SCHOOL LIBRARIES AND CURRICULA ON IDEOLOGICAL GROUNDS VIOLATES THE FIRST AMENDMENT RIGHTS OF STUDENTS

School boards, no less than other arms of the state, are subject to constitutional constraints. When their actions infringe upon the constitutional rights of students, teachers or parents, the courts have not only the power, but the duty, to step in. See, e.g., Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). While this Court has recognized that local school authorities have broad discretion in setting school standards, Epperson v. Arkansas, 393 U.S. 97 (1968); Meyer v. Nebraska, 262 U.S. 390 (1923), it has also recognized that this discretion is not unlimited.

> School boards have, of course, important, delicate, and highly dicsretionary functions, but none that they may not perform within the limits of the Bill of Rights.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 637 (1943).

On the record, in this case, were this Court to rule in favor of the Board, it would establish the proposition that public school boards may arbitrarily and on the basis of their members' own narrow political, ideological, moral or religious views select or eliminate instructional or library materials. With all deference to the difficult role that school boards must play, the premise is faulty as a matter of constitutional law.

In Epperson v. Arkansas, supra, this Court explicitly rejected any suggestion that the state may justify the

exclusion of materials from public school curricula for reasons that violate the First Amendment. This Constitutional mandate, as well as the role which the public schools play in American life, require that decisions as to school curricula and library collections be premised on educational criteria, and not on the ideological or political predilections of local school board members or their perceptions of the ideological or political predilections of the majority of their constituents.

This Court has recognized that the Constitution protects the right to receive information and ideas in a wide variety of contexts. Listeners, readers or other willing recipients of expression who have been denied access to expression

protected by the First Amendment have a right to contest the denial. See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Procunier v. Martinez, 416 U.S. 396 (1974); Martin v. City of Struthers, 319 U.S. 141 (1943); Meyer v. Nebraska, 262 U.S. 390 (1923). See generally Emerson, Legal Foundations of the Right to Know, 1976 Wash. U.L.Q.

1. As Justice Brennan has said:

> One of the liberties we Americans prize most highly is our freedom to read what we wish and when we wish. It is hard to realize that nothing in the Constitution or the Bill of Rights says anything in terms about a freedom to read, or to listen, or even to think. Yet we know that such liberties are there just as surely as if they were expressly written into the First Amendment.

William J. Brennan, Jr., Address at the

Celebration of the Newark Public Library, May 1963, quoted in E. Moon, Book Selection and Censorship in the Sixties, 1969.

This right to read and to receive information and ideas surely applies in the public school context. Indeed, this right is "nowhere more vital" than in schools and universities. Shelton v. Tucker, 364 U.S. 479, 487 (1960). And it seems obvious that the right is directly threatened by the censorship of instructional materials and library books on ideological grounds.

Surely, school boards must make decisions as to the content of curricula and library collections and amici do not quarrel with the notion that they may make changes based upon economy, shelf

space, educational purpose or any number of other reasonable criteria. In so doing, they inevitably make their own views known and heard. But they must, at the same time, tolerate the expression of other, conflicting positions. See generally, L. Tribe, American Constitutional Law § 12-4 (1978).

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments

that are officially approved. Tinker v. Des Moines Independent Community School District, supra, at 511.

Indeed, decisions designed to exclude from curricula and libraries opinions and doctrines which are not "officially approved" undercut the fundamental justification for public schooling itself.

> The principle of making children good citizens ... does not dictate a grant of carte blanche authority to school boards. While cultivation of the qualities necessary for democratic citizenship is a permissible and admirable aim, the system of American democracy itself places highest value on the integrity of the individual and on individual freedom of thought. If schools were to possess the power to run roughshod over individual rights in education, the state would then be acting contrary to democratic values, the same democratic values which education is meant to

instill.

Note, Challenging Ideological Exclusion of Curriculum Material: Rights of Students and Parents, 14 Harv. C.R. - C.L.L. Rev. 485, 493 (1979) [hereinafter "Ideological Exclusion"].

To acknowledge that school boards have that power is to pervert the very purpose of education:

> That [school boards] are educating the young for citizenship is the reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles as mere platitudes.

West Virginia State Board of Education v. Barnette, supra, at 637.

> The classroom is peculiarly the "market place of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange

> of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection.

Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (overturning discharge of state university professor for refusing to affirm that he was not a Communist).

Thus, the conclusion is inescapable that the First Amendment demands, and the proper functioning of the educational process in a democratic society requires, that the removal of books from a school library or classroom curriculum be based on educational considerations, not on political, ideological, moral or religious views.

The proposition is not a novel one. Several courts have recognized limits on school officials' discretion to

censor library collections or curriculum content.* See, e.g., Salvail v. Nashua

* The scholarly commentators have been virtually unanimous in urging recognition of those limits. See e.g., Ideological Exclusion, supra; Comment, Constitutional Aspects of Removing Books from School Libraries, 65 Kent. L. J. 127 (1978); Comment, First Amendment Limitations on the Power of School Boards to Select and Remove High School Text and Library Books, 52 St. John's L. Rev. 457 (1978); O'Neil, Libraries, Liberties and the First Amendment, 42 U. Cin. L. Rev. 209 (1973); Note, Censoring the School Library: Do Students Have the Right to Read, 10 Conn. L. Rev. 747 (1978).

Board of Education, 469 F. Supp. 1269 (D.N.H. 1979) (removal of MS. Magazine from high school library because of objections to its political and sexual content); Minarcini v. Strongsville City School District, 451 F.2d 577 (6th Cir. 1976) (school board's removal of books from school library because it found them distasteful violated students' Constitutional rights); Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980); Right to Read Defense Committee of Chelsea v. School Comm. of Chelsea, 454 F. Supp. 702 (D. Mass. 1978).

That the book removal in this case was based on impermissible ideological considerations is obvious from a consideration of the conceded facts. The sequence of events leading up to the removal of the books establishes that the removal was not an exercise of discretion based on educational values and considerations, but was instead a direct reaction to pressures exerted by persons outside the community who found the books in question offensive to their personal value systems. The search of the card catalogue and the removal of books was done pursuant to PONY-U's suggestion. It followed directly on the heels of the PONY-U meeting and was limited to those books on PONY-U's "unacceptable" list.

That the ultimate decision to ban the books was a suspect reaction to

outside political pressure is further established by the Board's ultimate disregard of the recommendation of its own appointed book review committee and the reasons given by it in justification. In spite of that committee's recommendations, access to all books on the PONY-U list, save two, was denied or severely limited. No reasons for rejecting the committee's recommendations were offered when the decision to reject was made.

That impermissible ideological considerations were at the heart of the Board's decision to ban the books is clear from the Board's public statements issued prior to its final decision as well as the school board president's and vice-president's after-the-fact sworn statements as to the basis for the Board's determination. By its terms, the

judgment that a book is un-American is a political decision. A judgment that a book is blasphemous, is a judgment informed by impermissible religious considerations. See Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505 (1952). ("It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.") A judgment based on a determination that the books are "just plain filthy" is one that invites, not precludes, judicial scrutiny.

School authorities can regulate indecent language because its circulation on school grounds

> undermines their responsibility to try to promote standards of decency and civility among school children ....[B]ut school officials are not the final arbiters of their authority, nor do they have limitless discretion to apply their own notions of indecency. Courts have a First Amendment responsibility to insure that robust rhetoric in student publications is not suppressed by prudish failures to distinguish the vigorous from the vulgar.

Thomas v. Granville Board of Education, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J. concurring) (emphasis supplied).

And a judgment that a book is offensive to Christians or Jews, anti-Christian or anti-Semitic is, given the books at issue here, incomprehensible. In fact, The Fixer, a book judged anti-Semitic by the Board, clearly condemns anti-Semitism as well as the authoritarian society which is

anti-Semitism's seedbed. In words that are remarkably apposite here, its author wrote:

> "What I want to know is what's going on in the world."
>
> "That's all in the Torah, there's no end to it. Stay away from the wrong books, Yakov, the impure."
>
> "There are no wrong books. What's wrong is the fear of them."

B. Malamud, The Fixer, 12-13 (1966) (emphasis added).

The students have shown that books were removed from their library and curriculum on the basis of impermissible ideological criteria, and, therefore, in violation of their First Amendment rights. Accordingly, they are entitled to judgment.

II. THE REMOVAL OF BOOKS FROM SCHOOL LIBRARIES AND CURRICULA WITHOUT REFERENCE TO NARROWLY DRAWN EDUCATIONAL CRITERIA VIOLATES THE FIRST AMENDMENT RIGHTS OF STUDENTS

Alternatively, if this Court determines that the record fails to establish that the Board's decision was premised on impermissible ideological, political, religious and moral grounds, the Board's decision nevertheless cannot stand because it was not based on the narrowly drawn regulations required by the Constitution for regulation of expression.

It is hornbook law that the First Amendment has a "preferred position" in our Constitutional scheme. "Because First Amendment freedoms need breathing space to survive, government may regulate

in the area only with narrow specificity." NAACP v. Button, 371 U.S. 415, 433 (1963). In light of the danger of over-inclusive regulation, courts have been particularly diligent in scrutinizing government intrusions into expression which are based on the content of that expression, as opposed to its time, place or manner. Papish v. University of Missouri Board of Curators, 411 U.S. 667 (1973).

Amici recognize that schools are, in some respects, special institutions where First Amendment rights are concerned. See Healy v. James, 408 U.S. 169 (1972). But, it is a maxim that "[neither] students [nor] teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse

gate." Tinker v. Des Moines Independent Community School District, supra, at 506.

Even in restricted environments, like prisons or the military, regulations on communications which are not reasonable or which are not consistent with the legitimate operational considerations of the institution will not be tolerated. See Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977); Greer v. Spock, 424 U.S. 828 (1976); Pell v. Procunier, 417 U.S. 817 (1974); Procunier v. Martinez, 416 U.S. 396 (1974). In schools, as in other "special settings" where First Amendment rights must be balanced against other compelling interests, the state must, where practicable, make clear the

classes and methods of expression which it deems irreconcilable with the specific institutional setting. Cohen v. California, 403 U.S. 15, 19 (1971); Thomas v. Granville Board of Education, supra, 607 F.2d at 1049 & n.10.

The Board wholly failed to do that here. Guidelines consistent with the First Amendment did not exist and were not followed in removing the books from the school library and curriculum.

The Review Committee selected by the Board was given guidelines. It was charged to review the books on the basis of the following criteria: 1) their educational suitability; 2) good taste: 3) relevance; 4) appropriateness to age level. These criteria were hastily formulated and amorphous; the relative

weight to be given to each criterion was not specified. Those guidelines were thus unconstitutionally vague.

Accordingly, even assuming that the Board itself in rejecting the committee's recommendations followed the guidelines it had formulated for it, (an assumption not borne out by the record which suggests that the Board members acted on their own following no articulated guidelines), the Board's decision to ban the nine books was invalid. The narrow specificity necessary to validate governmental suppression of communication was wholly lacking.

Because the record establishes that the decision to ban the books was made without reference to narrowly drawn

educational criteria, the decision cannot stand. It violates the First Amendment rights of students.

CONCLUSION

Amici contend that the school board's removal of the books in this case was based not on educational considerations, but rather on impermissible ideological factors. Moreover, the removal of the books was undertaken pursuant to no narrowly drawn regulations or articulated criteria. Under these circumstances, the Board's actions cannot be permitted to stand.

Accordingly, amici respectfully urge this Court to direct the entry of summary judgment in favor of the students-respondents.

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December 1981

No. 80-2043

Office - Supreme Court, U.S.
FILED
DEC 31 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26; RICHARD AHRENS, FRANK MARTIN, CHRISTINA FASULO, PATRICK HUGHES, RICHARD MELCHERS, RICHARD MICHAELS, and LOUIS NESSIM,

Petitioners,

against

STEVEN A. PICO, by his next friend, FRANCES PICO; JACQUELINE GOLD, by her next friend, RONA GOLD; RUSSELL RIEGER, by his next friend, SAMUEL RIEGER; GLENN YARRIS, by his next friend, RICHARD YARRIS and PAUL SOCHINSKI, by his next friend, HENRY SOCHINSKI,

Respondents.

AMICUS CURIAE BRIEF OF THE AMERICAN LIBRARY ASSOCIATION THE NEW YORK LIBRARY ASSOCIATION AND THE FREEDOM TO READ FOUNDATION

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Respondents.

AMICUS CURIAE BRIEF OF THE AMERICAN LIBRARY ASSOCIATION, THE NEW YORK LIBRARY ASSOCIATION AND THE FREEDOM TO READ FOUNDATION

The American Library Association, the New York Library Association and the Freedom to Read Foundation submit this Brief *Amicus Curiae.* All of the parties to this cause, through their counsel, have consented to this filing; their written consents have been filed with the Clerk pursuant to Rule 36.

STATEMENT OF INTEREST

The American Library Association ("ALA") is the oldest and largest library association in the world and is chief spokesman for the modern library movement in this country. The ALA's membership includes more than 39,000 libraries, librarians, library trustees, and members of the public. Through its affiliation with constituent state library associations, ALA represents over 29,000 public, university and special libraries, over 90,000 elementary and secondary school libraries and media centers, and over 120,000 librarians. The New York Library Association ("NYLA"), a chapter of ALA, has served for nearly 90 years as the chief proponent of library service in the State of New York. Its membership includes over 3,500 libraries, librarians, library trustees, library administrators and members of the public.

The Freedom to Read Foundation, a non-profit organization supported by voluntary donations, was established in 1969 by the American Library Association to promote and defend First Amendment rights; to foster libraries as institutions wherein every citizen's First Amendment freedoms are fulfilled; to support the right of libraries to include in their collections and make available any work which they may legally acquire; and to set legal precedent for the freedom to read on behalf of all citizens.

Amici are vitally committed to the preservation of the American library as a resource indispensable to the intellectual, cultural, and educational welfare of the Nation.

ISSUES ADDRESSED IN THIS BRIEF

We will not repeat the arguments of the parties. Rather we will focus on two key points that Appellants have overlooked. First, Appellants' Brief treats this case as if curricular decisions

were in issue. (Appellants' Brief at 13-21, 29-33.) This case, however, is about a *library*, not a school's curriculum. This is an extremely important distinction for the evaluation of the First Amendment interests at stake here.

Second, nowhere in the papers before the Court do the parties discuss a standard for federal jurisdiction in these cases. A standard is necessary because this Court's decisions make clear that the First Amendment does limit a school board's actions. *E.g., Epperson* v. *Arkansas*, 393 U. S. 97, 104-05 (1968); *Tinker* v. *Des Moines Indep. Comm. School Dist.*, 393 U. S. 503, 506-07 (1969). We believe that this case presents an opportunity for articulating a standard for judicial review of cases involving censorship of school libraries.

ARGUMENT

I.

THE LIBRARY EXISTS TO PRESENT AND PRESERVE ALL POINTS OF VIEW.

The school board below banned books from a library. Thus, this case does *not* present an issue concerning the board's control of curriculum, *i.e.* what is taught in the classroom. We freely concede that the school board has the right and duty to supervise the general content of the school's course of study. However even in the classroom, school board authority, albeit plenary, must give way and yield when there is a pattern of suppression of fundamental rights. *Epperson* v. *Arkansas*, 393 U. S. at 104-105; *Meyer* v. *Nebraska*, 262 U. S. 390 (1923). As a corollary, outside of the classroom, school board discretion is far more circumscribed because the board's prerogatives are less and the individual's rights are greater. *Tinker* v. *Des Moines Indep. Community School Dist.*, 393 U. S. 503 (1969); *Zykan* v. *Warsaw Community School Corp.*, 631 F. 2d 1300, 1305 (7th Cir. 1980) ("control of matters not immediately affecting classroom activities is subject to numerous qualifications").

To the extent that there is judicial deference to the board's control over the classroom and hallways, that accommodation is based on the role of the schools in teaching the basic values of our society. *See, e.g., East Hartford Ed. Ass'n.* v. *Board of Education*, 562 F.2d 838, 859 (2d Cir. 1977) (en banc). Given the electoral process, the community values or standards that find their way into the curriculum are in the main those of the majority, and there is little a court can effectively do (save in the outrageous case) to ensure a minority voice. But while majority rule may be permissible, within constitutional limits, in setting the curriculum and governing the classroom, majority rule dictating the contents of a library is antithetical to the very concept of a society with many voices.

The library has rightly and traditionally been regarded as an "open port," a free marketplace of ideas, popular and unpopular. *Minarcini* v. *Strongsville City School Dist.*, 541 F. 2d 577, 582 (6th Cir. 1976). To whatever degree the classroom, or other government activities or decisions have become vehicles for social, political, cultural, economic or religious indoctrination and propaganda, the library has served as an intellectual armory, supplying facts, concepts and the widest spectrum of knowledge to all without fear or favor. The *raison d'etre* of the library is to serve, present, and preserve all points of view, not just those of the majority. The library, unlike the school curriculum, simply does not exist primarily to teach the majority's values or to socialize the child.

The school library in particular has been recognized as "a mighty resource in the free marketplace of ideas." *Minarcini, supra*, 541 F. 2d at 582. As the Court observed in *Right to Read Defense Comm. of Chelsea* v. *School Comm.*, 454 F. Supp. 703, 715 (D. Mass. 1978):

> [A] student can literally explore the unknown and discover areas of interest and thought *not covered by the prescribed curriculum.* The student who discovers the magic of the library is on the way to a life-long experience of self-education and enrichment. That student learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom.
>
> The most effective antidote to the poison of mindless orthodoxy is ready access to a broad sweep of ideas and philosophies. There is no danger in such exposure. The danger is in mind control.

See Keyishian v. *Board of Regents*, 385 U. S. 589, 603 (1967) ("[t]eachers and students must always remain free to inquire, to study and evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die").

Appellees are not attempting to force anyone to read, use, or purchase the books at issue. Rather, they only are asking

that the existing books remain available on the library shelf and not be censored by removal because a group of public officials do not approve of their content. Such censorship in a library —and especially a school library—cuts at the heart of the First Amendment.

> As this Court held in *Tinker, supra,* 393 U. S. at 511:
>
> In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.

If students know that some books are banned from a school library because of their content, the message is clear that government has declared that the ideas expressed in those books are taboo. Our First Amendment values and tradition of freedom of thought reject such conduct by government.

II.

PUBLIC OFFICIALS MAY NOT BAN BOOKS ON THE BASIS OF THEIR CONTENT.

Few courts have addressed the issue of content-based book banning in school libraries, and those that have done so diverge concerning the standard for a federal court to hear and decide a case like this. *Compare Zykan* v. *Warsaw Community School Corp.,* 631 F. 2d 1300, 1308 (7th Cir. 1980) (court must step in to prevent imposition of orthodoxy) *with Minarcini* v. *Strongsville City School District,* 541 F. 2d 577, 582 (6th Cir. 1976) (removal based on content violates First Amendment) *and* the panel majority below. But all agree that at some point a federal forum must be available to act and protect the First Amendment.

We believe and urge that those who use the library state a federal claim when they plead facts sufficient to show that the constituted authority removed a book that is not in law illegal (*i.e.*, obscene or otherwise outside the protection of the First Amendment) from a library to suppress the ideas in that book. This standard is firmly rooted in First Amendment principles of robust debate and does not burden the Courts with garden-variety, back-fence disputes over local affairs.

A public official cannot ban a publication simply because he does not like the ideas expressed in it. Such conduct is antithetical to a free society and is a reincarnation of Milton's licensor. *Lovell* v. *Griffin,* 303 U. S. 444, 451 (1938). A totalitarian government always restricts newspapers, regulates the use of printing equipment, and controls radio and television broadcasts. Indeed, these were among the very first acts of the Polish authorities last month. *See, e.g.,* "Martial Law—What it Means in Poles' Lives," *Chicago Sun-Times,* December 15, 1981, page 6.

The philosophy espoused by Appellants of purging all works that are in some way inconsistent with "community values" has resulted in such aberrations as the burning of Dante's Divine Comedy by the Florentines, the suppression of Galileo's Dialago in Rome, and the banning of Twain's The Adventures of Huckleberry Finn as "trash and suitable only for the slums." A. Haight & C. Grannis, *Banned Books 387 B.C. to 1978 A.D.* (1978). Unfortunately, from colonial days books have been attacked and sought to be suppressed in this country as well as in dictatorships; one of the early heritages acquired from across the sea was the practice of censorship. Indeed, the First Amendment was adopted because of this noxious practice and the seditious libel trials that ensued; today, our government

cannot outlaw writings because the publications are not in favor with the authorities, *i.e.*, this very case. *See New York Times Co.* v. *United States*, 403 U. S. 713, 715-717 (1971); *Lovell* v. *Griffin*, 303 U. S. 444, 451-452 (1938).

Library collections must have range, depth and continuity over time to serve their high purpose. Purging a library collection of books offensive to the majority, as Appellants urge, robs the library of its fundamental nature and has the same chilling effect on the "free marketplace of ideas" as outright censorship of newspapers and radio. The purge in the name of the child fetters the First Amendment's liberty of circulation which this Court, time and again, has held "is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Lovell* v. *Griffin*, 303 U. S. at 452.

Freedom of speech and press includes "not only the right to utter or to print, but . . . the right to receive, the right to read . . . and freedom of inquiry [and] freedom of thought, . . ." *Griswold* v. *Connecticut*, 381 U. S. 479, 482 (1965); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U. S. 748 (1976). The library is a principal place in our society where one can go to explore and find almost every idea imaginable to exercise these rights. The First Amendment necessarily protects the library collection as the primary source of what is received and can be read, the repository of the knowledge and ideas that sustain inquiry and thought.

Freedom of inquiry is especially important for the children who are school library users. The school board below must heed this Court's admonition in *West Virginia* v. *Barnette*, 319 U. S. 624, 637 (1943):

> That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

The child whose inquiries lead him to explore beyond the curriculum should not have any avenues of inquiry foreclosed.

Curiosity is to be encouraged, not suppressed. If we cannot teach our children by example to protect and respect First Amendment values, then we will indeed "strangle the free mind at its source."

That a book may be available elsewhere does not mitigate the First Amendment violation. Restraint on expression cannot be justified by the availability at other times and places of opportunities for such expression. *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U. S. 546, 556 (1975); *Schneider* v. *State,* 308 U. S. 147, 163 (1939). As stated in *Right to Read Defense Committee of Chelsea* v. *School Comm.,* 454 F. Supp. 703, 714 (D. Mass. 1978):

> If this work may be removed by a committee hostile to its language and theme, then the precedent is set for removal of any other work. The prospect of successive school committees "sanitizing" the school library of views divergent from their own is alarming, whether they do it book by book or one page at a time.
>
> What is at stake here is the right to read and be exposed to controversial thoughts and language—a valuable right subject to First Amendment protection.

The bright-line standard we urge here would not burden the Courts. Even before this case, the impact of book banning cases on the federal case load was miniscule; for the twelve-month period ending June 30, 1980, 168,754 civil cases were filed in the federal courts. *1980 Annual Report of the Director* 54 (Administrative Office United States Courts). Yet, over the last *ten years* there have been less than twenty reported decisions in cases such as here.

We do not suggest that a book can never be removed from a library. Once a book has been placed on a shelf someone has made the determination that the book has value—the state has

paid money to acquire it. But lack of shelf space, obsolescence, and even possibly improper procurement are all legitimate reasons, among others, for removal. As in any civil rights action, a good faith defense would apply and the removal of a book for non-content related reasons plainly insulates state action from the federal court.

Finally, the standard we urge here fully accommodates the community's interest in inculcating civic values since it does not involve federal judicial review of curriculum. But, if there is any question about the propriety of a publication on the library shelves, in limited circumstances a less suppressive alternative should be sought, such as restricted shelving with access upon parental consent. Exclusion of the book from the library, as occurred below, is never a solution that is either palatable or permissible under our Nation's strongly held First Amendment beliefs.

CONCLUSION

A library, unlike the school curriculum, does not exist to indoctrinate. Rather, the library is a precious resource, a fountainhead of knowledge, and knowledge is the key to our democracy. James Madison, who chaired the committee that drafted the First Amendment, recognized this when he wrote

> A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or tragedy; or, perhaps, both. Knowledge will forever govern ignorance; and a people who mean to be their own governors, must arm themselves with the power which knowledge gives.[1]

To allow banning of books by school boards based on the ideas expressed in those books would violate the core purpose of the First Amendment and the very purpose of the library as a "mighty resource in the marketplace of ideas."

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed and the case remanded for trial.

Respectfully submitted,

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[1] James Madison, letter to W. T. Barry, Aug. 4, 1822, in *The Complete Madison* (New York: Harper, 1953) p. 337.

No. 80-2043

Office - Supreme Court, U.S.
FILED
JAN 4 1982
ALEXANDER L. STEVAS
CLERK

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF ON BEHALF OF ASSOCIATION OF AMERICAN PUBLISHERS, INC., AMERICAN BOOKSELLERS ASSOCIATION, INC., AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INDEPENDENT LITERARY AGENTS ASSOCIATION, INC., INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., NATIONAL ASSOCIATION OF COLLEGE STORES, INC., and WRITERS GUILD OF AMERICA, EAST, INC. AS *AMICI CURIAE*

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No. 80-2043

IN THE

Supreme Court of the United States

October Term, 1981

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26, *et al.*,

Petitioners,

against

STEVEN A. PICO, by his next friend, FRANCES PICO, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF ON BEHALF OF ASSOCIATION OF AMERICAN PUBLISHERS, INC., AMERICAN BOOKSELLERS ASSOCIATION, INC., AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INDEPENDENT LITERARY AGENTS ASSOCIATION, INC., INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., NATIONAL ASSOCIATION OF COLLEGE STORES, INC., and WRITERS GUILD OF AMERICA, EAST, INC. AS *AMICI CURIAE*

The Association of American Publishers, Inc., *et al.*, submit this brief, *amici curiae,* pursuant to Rule 36.2 of the Rules of this Court, in support of respondents, Steven A. Pico, *et al.*, urging, alternatively, modification of the decision of the court below[1] by a holding that the actions of petitioners herein, the Board of Education of the Island Trees Union Free School District, *et al.*, have violated the First Amendment, or affirmance of that court's remand of the case to the district court for trial.[2]

The *Amici*

The Association of American Publishers, Inc. is the major national association for publishers of general and educational books in the United States. Its more than 300 members include large commercial book publishers and small or non-profit publishers, university presses and scholarly associations. The publishers of all the books removed or restricted by the Island Trees Board are or were members of the AAP.

American Booksellers Association, Inc. is a trade association composed of booksellers located throughout the United States. The Association has approximately 5,200 members consisting of private bookstores, university bookstores, and chain bookstores.

The American Society of Journalists and Authors, Inc. is the nationwide organization of independent nonfiction

1. The opinion below is reported at 638 F.2d 404 (2d Cir. 1980), *reh'g and reh'g en banc denied,* 646 F.2d 714 (1981).

2. The written consents of all parties to the filing of this brief are submitted herewith.

writers. The Society currently includes more than 600 leading freelance writers of magazine articles, trade books and other forms of nonfiction writing who have met the Society's standards of professional achievement.

Council for Periodical Distributors Associations is a national trade association for over 500 independent local wholesale distributors of magazines, comic books, paperback books, and newspapers.

Independent Literary Agents Association, Inc. ("ILAA") is a not-for-profit membership corporation consisting of professional literary agents whose principal purpose is to protect and enhance the interests of those agents and the authors they represent. Many of the clients represented by ILAA members are authors of literary works that have been selected for use in countless public school libraries and classrooms throughout the United States.

International Periodical Distributors Association, Inc. is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

National Association of College Stores, Inc. is a trade association composed of college bookstores located throughout the United States.

Writers Guild of America, East, Inc. is an organization of writers engaged in preparing literary material for various entertainment media.

Interest of the *Amici*

Amici represent the broad spectrum of book publishers, writers, and those who disseminate their works. All of the *amici* share a common interest in fostering and preserving a robust First Amendment, which serves as the cornerstone that enables *amici* vigorously to carry on their craft. *Amici* recognize that the free expression guarantees of the First Amendment are vital to the development of an informed citizenry. Nowhere is exposure to the diverse range of ideas contained in the works created and made available by *amici's* members more important than in the public schools of our nation, which help prepare students for their future roles in society. For these reasons, *amici's* members wholeheartedly subscribe to this Court's recognition that:

> "[i]n our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." *Tinker* v. *Des Moines School District*, 393 U.S. 503, 511 (1969).

The Unusual Nature of This Case

As a general proposition, *amici* recognize and endorse the propriety of investing school officials with broad latitude over curricular matters in connection with the conduct of our system of public education. But this Court has made clear that that latitude is not boundless. School officials—like all state officers—are, as they must be, bound by the dictates of the First Amendment.

The pursuit of educational policy by school authorities in the review, selection, adoption, purchase, reevaluation, removal or restriction of books and related educational materials necessarily entails express or implicit content-based choices and value judgments. Such judgments, nonetheless, may not violate the First Amendment, and an important aspect of the implementation of such policy involves a balancing of appropriate educational judgments with the dictates of the First Amendment. In the course of undertaking their book-selection decisions, therefore, school officials are presumed to be cognizant of, and sensitive to, the value placed by our constitutional system upon the availability of a wide range of philosophies and ideas inside the classroom and school library. When regular procedures governing selection and removal are adopted and followed, and when the bases for arriving at particular selection and removal decisions are consistent with educational policy and objectives, *amici* believe that important First Amendment interests are likely to be protected.

Countless book-selection decisions are undertaken nationwide each year without challenge. It is the rare case of selection or removal that causes constitutional concern. The startling facts presented in the instant case—and lucidly set forth in Judge Sifton's opinion below—represent such a case. Those facts graphically demonstrate what can occur when school officials fail to base their decisions on educational criteria—pursuant to established procedures—and, in the process, exhibit total insensitivity to the constitutional interests implicated in the book-selection/book-removal process.

The Books Removed

This case centers around the circumstances of the removal, by the Island Trees School Board, of a number of fine books—some even great books—from the curriculum and library shelves of the Island Trees School District.

Ten books in all were the focus of the Board's action.[3] Among the ten are: three works of fiction; four autobiographies; two standard literary anthologies; and one nonfiction book. Individually and taken as a group, the banned books are notable for their high literary and educational quality.

Of the three fictional works, two are novels written for general audiences; one is a juvenile book widely recommended for young adults. One of the novels, *The Fixer* by Bernard Malamud, won the Pulitzer Prize for Letters and the National Book Award. Although the Board apparently removed the work, *inter alia,* because of potential offense to Jews, in actuality the book is a powerful statement against anti-Semitism. The second novel, *Slaughterhouse-Five* by Kurt Vonnegut, Jr., was nominated for a National Book Award and won a number of other awards for literary achievement. Although the Board ostensibly removed *Slaughterhouse-Five, inter alia,* because of its anti-Christian sentiments, the book in actuality is recognized as reflecting, albeit with ironic subtlety, a humane world-view in harmony with the highest aspirations of Christian principles. The juvenile book, *A Hero Ain't Nothin' But a Sandwich* by Alice Childress, was removed by the Board because it contains "ungrammatical" ethnic

3. Nine books were barred outright from the library and curriculum. Richard Wright's *Black Boy* was left in the library on a restricted basis.

language and, in the Board's view, "anti-American" ideas. This book was also nominated for a National Book Award and won numerous other prizes; it was widely acclaimed both for literary achievement and for special pertinence to teen-age readers.

Although the Board objected to isolated excerpts containing "filthy" language, the four autobiographies, viewed as a whole, are all highly praised works. Three are by and about the difficult lives of members of minority groups; the fourth, *Go Ask Alice,* is the anonymous posthumous story of a teenage girl's tragic encounter with drugs. *Black Boy* is the autobiography of Richard Wright's early years. Wright, author of *Native Son,* is one of the most widely-acclaimed black authors in 20th-century American literature. *Soul on Ice* by Eldridge Cleaver became an immediate, albeit controversial, classic of black radical thought and philosophy. Although Board President Ahrens found the book "degrading to blacks," it won the Martin Luther King Prize and has been widely acclaimed for the quality of its literary craft. *Down These Mean Streets* is another powerful and, therefore, to some, controversial story of ethnic poverty as told by American-Puerto Rican author Piri Thomas.

The two banned anthologies are standard works which have enjoyed wide readership. *Best Short Stories by Negro Writers* is a collection of short stories by America's finest black writers. The book's editor, Langston Hughes, was himself a widely-acclaimed black poet and author, noted for his efforts to introduce other black poets and writers to a broader reading public. *A Reader for Writers,* edited by Professor Jerome Archer, is a collection of fine writing

by a long list of noted authors and essayists. This anthology was apparently listed as objectionable because of a single comment in an essay by Robert Penn Warren about Black Muslim leader Malcolm X, and banned by the Board because Board members found Jonathan Swift's classic essay, "A Modest Proposal," to constitute "irrelevant" and "inappropriate" reading.

The nonfiction work, *The Naked Ape,* is a popular book written by a respected and widely-read zoologist.

In the Appendix to this brief we discuss in greater detail the overall distinguished quality of the ten books banned from Island Trees.

The Circumstances Surrounding the Removals

The record compellingly demonstrates that, in ordering the book removals, the Island Trees Board did not rely upon their own (or others') considered educational judgments. Instead, the Board's actions amounted to an arbitrary assertion of a right of censorship, exercised with neither sensitivity, professionalism nor restraint, and unjustified by any accepted educational criterion.[4]

4. The Board's brief is noteworthy for paying mere lip service to any educational rationales for the books' removal. Instead, the Board seems to equate "moral value judgments," "respect for decency, authority and other traditional values," "personal value sets," "subjective content based decisions," "basic community values," and the like, with determinations of "educational suitability." Brief for Appellants at 23, 29. While *amici* do not urge that a school board's sense of community values may not be a relevant consideration in connection with curricular decisions, the assertion of such justifications without more, *e.g.,* an assessment of the literary and educational merits of the works involved—particularly in a book removal context—suggests that doctrinaire, as opposed to educational, motivations may well underlie the decisions.

The Board's disregard for arriving at educationally sound judgments as to the challenged books is reflected in, among others, the following facts:

- **The Board did not read the books prior to ordering their initial removal from the school library shelves.**
- **Prior to ordering the books' removal, the Board did not seek the views of the librarians or teachers who had initially selected the books through the regular acquisition channels.**
- **The Board ignored the recommendations of the School District Superintendent concerning appropriate procedures to follow in evaluating the works.**
- **The Board did not consult the standard, professional review media that are generally considered an indispensable aid in the evaluation process.[5]**
- **The Board did not take action at the instance of any student, teacher or citizen in the community, but in response to unknown members of a conservative citizen's group in another community.**
- **When an allegedly representative, ad hoc committee appointed by the Board recommended the reinstatement of most of the banned books, the Board largely disregarded their recommendations.**
- **The Board did not even apply its own reevaluation policy or the policy recommended by the State Board of Regents.[6]**

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5. All but one of the banned books had been recommended by professional reviewing and listing media as appropriate for use by junior and senior high school students.

6. Although the Board contends that it followed the Regents guidelines, in fact a fair reading of the guidelines indicates that the Board clearly violated several of the selection "criteria" there defined. *See, e.g.*, criterion (13) (the "value and impact of any literary work

(footnote continued on next page)

— No budgetary or physical constraints required the removal or restriction of the books, already purchased by school professionals, from the Island Trees libraries and classrooms.

Perhaps the most compelling evidence of the irrationality of the Board's actions is the overall quality of the books themselves. With due respect to the Board, *amici* are hard put to characterize these works, as the Board attempts, as lacking educational suitability as the result of "rampant obscenities, vulgarity, gross sexual allusions, blasphemies (in 1 book) and their general bad taste." Brief for Appellants at 34. *Amici* submit that such judgments as to the literary and educational quality of the works are understandable only in light of the Board's concession that the Board lacked "the technical expertise of their librarians or the knowledge of literature possessed by the teachers of English." Brief for Appellants at 23.[7]

Not surprisingly, in the light of such indicia of irregularity, the majority below expressed skepticism at the ostensible justifications, *e.g.*, indecent language, offered by

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will be judged as a whole"); criterion (15) (sexually-oriented materials "will be subjected to a test of literary merit and reality" and will not automatically be disqualified due to the fact that "sexual incidents or profanity" are present); criterion (11) ("materials will not be excluded because of the race, nationality, political, or religious views of the author . . ."); and criterion (1) (materials "should reflect the pluralistic character and culture of American Society"). University of the State of New York, State Education Department, Bureau of School Libraries, *Selection Guidelines: School Library Resources, Textbooks, Instructional Material* (undated).

7. Notwithstanding this admission, the Board elsewhere concludes: "*Someone* has to make a choice regarding the educational suitability of instructional materials. It has already been shown that the staff professionals are not the proper parties. . . ." Brief for Appellants at 35 (emphasis in original).

the Board for the removals. Both Judges Sifton and Newman properly were concerned, based on the record, that in fact the Board may have been motivated by ideological, as opposed to educational, interests, and that, accordingly, the professed bases for their actions "were simply pretexts for the suppression of free speech." 638 F.2d at 417. Indeed, Judge Sifton found the record before him to be so compelling that he was prepared to draw the inference that the Board's actions had as their purpose the establishment of the Board's personal standards of taste, morality and political belief "as the correct and orthodox ones for all purposes in the particular community." *Ibid.*[8]

The Potential Consequences of the Removals Beyond This Case

The implications of the Board's actions go well beyond the ten books involved. The capricious and ill-defined standards applied by the Board, if sanctioned, would enable school boards to ban from their school systems, for whatever reason, a limitless number of fine books expressing a broad range of ideas and philosophies. One can always find a "dirty" word, or controversial idea, or "ungrammatical" phrase, or determine that a work is "irrelevant" to the curriculum, as a supposed basis for barring a work from the classroom or school library. *Amici* submit that, unless such decisions are grounded in regularized procedures, designed to promote the best educational interests of the students and to minimize intrusions on constitutionally-protected expression, abuses of school officials' educa-

8. While not prepared, on the present record, to go so far, Judge Newman concurred that the rights of students and others are impaired where "books are the focal point of official action designed to suppress the ideas that the books contain." 638 F.2d at 435.

tional mandate and disregard for a diversity of expression are invited.

Moreover, in the absence of a coherent policy, decisions to remove particular books from the curriculum or school library are certain to convey the wrong constitutional message to the student body—irrespective of the extent to which discussion of the works technically may still be allowed in the classroom or to which the works may be available outside of school. For, as Judge Newman noted, works apparently singled out for no rational reason "signal to the students and the teachers an official message that the ideas presented in those books are unacceptable, are wrong, and should not be discussed or considered. The chilling effect of this message on those who would express the idea is all too apparent." 638 F.2d at 434.

There are other troubling implications of sanctioning the Board's conduct. For example, can the application of a standard of censorship be countenanced that is said to justify the ban of books of superior quality because of potential offense from an isolated excerpt or passage, especially if it is taken out of context? What course in modern literature, for example, can be fairly taught that excludes works that contain an occasional "indecent" word or sexual allusion? Indeed, what course in Shakespeare could be taught if sexual allusion were forbidden? And what course in social studies can be valid if realistic portrayals of poverty or repression or frank presentation of controversial issues are not considered to be a permissible part of the classroom curriculum or even the library collection?

In sum, in the view of the *amici*, permitting the Island Trees School Board to engage in its free-wheeling brand of censorship would surely lead to the improper exclusion of ideas, theories and philosophies from the libraries and classrooms of our nation's schools—contrary to the teachings of this Court and to the most basic tenets of the First Amendment.

Summary of Argument

The actions of school authorities, while entitled to considerable latitude in furthering the state's legitimate educational objectives, are nevertheless subject to First Amendment and other constitutional principles, as this Court has made amply clear.

The arbitrary and unprincipled removal of books from the Island Trees school libraries and curricula was properly recognized by the majority below to raise serious First Amendment concerns. Indeed, under this Court's prior decisions, such actions are in violation of the First Amendment and require judgment for respondents.

ARGUMENT

The Actions of the Island Trees School Board Involved Here Violate the First Amendment.

A. The Actions of School Authorities Are Subject to First Amendment Principles.

This Court has unequivocally and repeatedly affirmed the applicability of the First Amendment in the public school setting. The Court has cautioned: that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools," *Shelton* v. *Tucker,* 364 U.S. 479, 487 (1960); that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker* v. *Des Moines School District, supra,* 393 U.S. at 506; and that the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom," *Keyishian* v. *Board of Regents,* 385 U.S. 589, 603 (1967). *See also Epperson* v. *Arkansas,* 393 U.S. 97, 104 (1968) ("Our courts . . . have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard fundamental values of freedom of speech and inquiry and of belief"); *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 637 (1943).

This Court has, of course, recognized that the special functions to be performed by our schools require "care and restraint" on the part of the judiciary in interfering in the day-to-day operation of those schools. *Epperson* v. *Arkansas, supra,* 393 U.S. at 104. Thus, in general, school authorities enjoy the right to prescribe curricula for their

schools, *id.* at 107, and to control disruptive conduct within their schools. *Tinker* v. *Des Moines School District, supra,* 393 U.S. at 507.

However, the courts may not, by reason of solicitude for the educational functions to be performed by the schools, abdicate their judicial function of assuring that the performance of the school authorities' duties does not exceed legitimate bounds and unduly interfere with fundamental constitutional rights. As Justice Jackson wrote for this Court in *West Virginia State Board of Education* v. *Barnette, supra*:

> "[W]e act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed." 319 U.S. at 640.

The requirement that the courts vigilantly assure that the operation of our schools does not violate students' and teachers' First Amendment rights reflects, in part, a realization that school boards or other officials charged with the inculcative educational functions may at times be less sensitive than the Constitution requires to the expression of controversial or unpopular points of view. This Court articulated these concerns in *West Virginia State Board of Education* v. *Barnette, supra,* when it observed that:

> "[Boards of Education] are numerous and their territorial jurisdiction often small. But small and local authority may feel less sense of responsibility to the Constitution . . . . There are village tyrants as well as village Hampdens, but none who acts under color of

law is beyond the reach of the Constitution." 319 U.S. at 637-38.

This recognition of the need for continuing vigilance by the judiciary over constitutionally-sensitive activity on the part of states and state school authorities has necessarily injected the courts into a variety of school-related disputes. *See, e.g., Meyer* v. *Nebraska,* 262 U.S. 390 (1923) (state cannot prohibit the teaching of foreign languages to elementary school pupils); *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925) (state cannot prohibit attendance at private schools); *Keyishian* v. *Board of Regents, supra* (teacher loyalty law stricken); *Pickering* v. *Board of Education,* 391 U.S. 563 (1968) (teacher may not be dismissed for speaking out on issues of public importance); *Epperson* v. *Arkansas, supra* (state cannot prohibit the teaching of evolution); *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972) (state cannot compel school attendance in violation of students' rights of free exercise of religion); *Goss* v. *Lopez,* 419 U.S. 565 (1975) (students are entitled to procedural due process prior to suspension); *Mount Healthy City Board of Education* v. *Doyle,* 429 U.S. 274 (1977) (a non-tenured teacher may not be fired because of his "exercise of constitutionally-protected First Amendment freedoms"); *Widmar* v. *Vincent,* —— U.S. ——, 50 U.S.L.W. 4062 (Dec. 8, 1981) (invalidating a university's refusal to allow a student religious group to use campus facilities as a "content-based exclusion of religious speech").

The fact that judicial oversight may create certain additional burdens on the courts' resources is a necessary consequence of the courts' role in preventing encroachments on cherished First Amendment freedoms.

B. The Actions of the Island Trees Board Were Properly Determined by the Court Below to Raise Serious First Amendment Issues; Indeed, Those Actions Were in Violation of the First Amendment.

The majority below had no doubts as to whether the Island Trees School Board's actions in connection with the book removals "directly and sharply implicate basic constitutional values." *Epperson* v. *Arkansas, supra,* 393 U.S. at 104. Judges Sifton and Newman differed only as to whether the present state of the record, on cross-motions for summary judgment, fully warranted the conclusion that the First Amendment rights of the students and others had been violated. Judge Sifton believed that the record supported such a conclusion; Judge Newman preferred to await a full trial.[9]

The majority was troubled both by the Board's failure to follow appropriate procedures and by the dubious motivations underlying the removals. Specifically, Judge Sifton cited the "unusual and irregular intervention" of the Board members in the book removal process, 683 F.2d at 414, as well as the Board's lack of "sensitivity or precision" in dealing with the First Amendment issues raised. *Id.* at 416. Judge Sifton concluded that:

> "[w]hat is required in order to avoid the effect of governing school affairs simply by a vague and indefinite pall of orthodoxy is the development of a set of sufficiently objective criteria for the identification of

9. Judge Newman concluded: "In my view, the case presents a sufficient claim of constitutional violation, but requires a trial to determine whether the claim is supported by the facts . . . . The allegations of the plaintiffs, fully presented in Judge Sifton's opinion, are clearly adequate, if proved, to sustain the conclusion that the school has violated the First Amendment." 683 F.2d at 432, 436.

> speech which will be objected to and a sufficiently regular procedure for applying those criteria in concrete cases to permit students to determine with a reasonable degree of certainty what speech will be prohibited and when." *Id.* at 418, fn. 13.

Judge Newman likewise voiced concern that the Board's conduct might be of the type:

> "that tends to suppress ideas–conduct conveying the message that some idea or viewpoint is not merely unsound, but is not acceptable to be aired within the school community. First Amendment values are not only precious; they are fragile. In the context of this case they are easily threatened by inhibiting action that stops short of prohibition or restrictive regulation." *Id.* at 433.

For Judge Newman, the issue at trial "should not be simply whether ideas have been suppressed, but whether the action taken, in light of its motivation, posed a sufficient *threat* to the suppression of ideas." *Id.* at 437, fn. 8 (emphasis in original).

In light of the facts presented, the majority below was demonstrably correct in subjecting the Board's actions to constitutional scrutiny. Moreover, in requiring the Board to demonstrate the educational soundness of its decisions respecting the books, the court below acted entirely consistently with this Court's prior decisions.

This Court has recognized that school officials must demonstrate a reasonable basis, grounded in procedural regularity, for abridging expression that is otherwise protected by the First Amendment. As Justice Brennan articulated in *Keyishian* v. *Board of Regents, supra*:

> "We emphasize once again that '[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms,' *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 438; . . . 'Because First Amendment freedoms need breathing space to survive, government may regulate in this area only with narrow specificity.' *Id.* . . . The danger of [a] chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform . . . what is being proscribed." 385 U.S. at 603-604 (citations omitted).[10]

The Second Circuit has recognized this salutary principle in a line of decisions, including *James* v. *Board of Education*, 461 F.2d 566 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972). In *James*, Judge Kaufman wrote for the Court:

> "The question we must ask in every first amendment case is whether the regulatory policy is drawn as narrowly as possible to achieve the social interests that justify it, or whether it exceeds permissible bounds by unduly restricting protected speech to an extent 'greater than is essential to the furtherance of' those interests . . . .
>
> By requiring the Board of Education to justify its actions when there is a colorable claim of deprivation of first amendment rights, we establish a prophylactic procedure that automatically tempers abuse of properly vested discretion." *Id. at* 574, 575.

10. Outside the school setting, it is of course settled law that attempted governmental interference with First Amendment rights must be subjected to stringent procedural safeguards. *See, e.g., Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965) (requiring "procedural safeguards designed to obviate the dangers of a censorship system"); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963).

See also Russo v. *Central School District No. 1*, 469 F.2d 623, 632 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973); *Eisner* v. *Stamford Board of Education*, 440 F.2d 803, 809 (2d Cir. 1971).

Especially when, as in the instant case, the activity in question concededly involves content-based regulation of expression, such efforts at governmental control are to be viewed with the greatest of skepticism, *see, e.g., Widmar* v. *Vincent, supra; Carey* v. *Brown*, 447 U.S. 455 (1980); *Cohen* v. *California*, 403 U.S. 15 (1971); *Cox* v. *Louisiana*, 379 U.S. 536 (1965), and permitted only where the regulatory effort has been attended by carefully drawn guidelines and procedures designed to minimize the chilling impact of the regulation. *See, e.g., Freedman* v. *Maryland, supra; Bantam Books, Inc.* v. *Sullivan, supra.*[11]

Applying these settled constitutional principles to this case, *amici* respectfully submit that it is clear that the Island Trees School Board failed to sustain its constitutional burden. The Board did not act pursuant to "precision of regulation" or by resorting to "sensitive tools" designed to

11. Most recently, this Court has applied these principles in the university setting, requiring a showing that the attempted regulation of expression is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Widmar* v. *Vincent, supra*, 50 U.S.L.W. at 4064. *See generally Consolidated Edison* v. *Public Service Commission*, 447 U.S. 530, 540 (1980).

Even when evaluating regulations aimed primarily at conduct and only incidentally affecting speech, this Court has required that: the regulation must further an important or substantial governmental interest; and the restriction on expression be no greater than is essential to the furtherance of that interest. *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). *See also Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 564 (1980) (applying *O'Brien*-type standards to commercial speech).

assure that legitimate educational interests would be furthered by its contemplated action, *Keyishian* v. *Board of Regents, supra,* 385 U.S. at 603-604; nor did it demonstrate that it had chosen the most narrowly drawn means necessary to achieve a justifiable result. *James* v. *Board of Education, supra,* 461 F.2d at 574; *Widmar* v. *Vincent, supra,* 50 U.S.L.W. at 4064. The Board failed to make any findings relating to the educational value of the books reviewed. The sole criteria against which the books were judged were the personal views, reactions and biases of the Board members to brief passages wrenched out of the context of the works as a whole. The Board largely ignored the recommendations of its own review committee, which was charged by the Board with the task of assessing the educational significance of the works. And, strikingly, nowhere did the Board exhibit any sensitivity to the potential impact on expression of its standardless proceedings.[12]

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12. We note a recent study of book selection and removal in the public schools, one of the principal conclusions of which is that:

> "Schools that do have written selection policies and reconsideration procedures appear to resolve conflicts with fewer restrictions on the instructional and library materials available to students, and therefore with less negative impact on the educational environment."

Limiting What Students Shall Read, Summary Report on the Survey "Book and Material Selection for School Libraries and Classrooms: Procedures, Challenges and Responses" (1981). Sponsored by the Association of American Publishers, the American Library Association, and the Association for Supervision and Curriculum Development.

The study's conclusion comports with the fundamental assumption underlying procedural due process: that rational procedures promote rational decision-making. Obligated to follow a procedure for reviewing challenged books and to articulate reasons for any removal, a school board—like any other instrumentality of the state—is less likely to base its actions on the personal caprices of its members (or the desires of individual community members).

Amici submit that none of the Board's proffered justifications for its conduct passes constitutional muster. The Board's allegations as to the supposed "vulgarity" and "rampant obscenity" of the removed books, Brief for Appellants at 34, are constitutionally defective given the Board's reliance upon snippets of language, and its failure to make any determinations considering the works as a whole. *See Miller* v. *California*, 413 U.S. 15 (1973).[13]

As for the Board's assertions that it may freely "transmit community values" and engage in "political indoctrination" as a part of its educational mission, Brief for Appellants at 10, *amici* submit that it is a fine line that separates acceptable transmission of community values and political socialization from efforts to impose authoritarian viewpoints and convey the message that the views which may be held by others are somehow unacceptable. Where, as here, the Board has failed to follow normal procedures so as to determine that the banned books threaten or in any way undercut the educational process in its schools, has so boldly flaunted its majoritarian instincts, and has totally failed to exhibit any sensitivity to the potential impact on the rights of expression of students, teachers, and

13. This Court's holding in *FCC* v. *Pacifica*, 438 U.S. 726 (1978), relied upon by the Board, requires no different result. The regulatory power there ceded to the FCC over "indecent" expression was expressly premised, *inter alia*, on specific statutory language forbidding the use of ". . . indecent . . . language by means of radio communications" and by the unique characteristics of the broadcasting medium. *Id.* at 735, 748-49.

We note, in addition, that the Court in *Pacifica* would have invalidated the FCC's censorship "if there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content. . . ." 438 U.S. at 746.

others, this Court should decline to cloak the Board's actions with legitimacy. Quite to the contrary, this Court should rule that the Board's actions have contravened the requirements of the First Amendment.

Conclusion

The constitutional considerations raised by this case warrant this Court's awarding judgment to respondents on the basis of the Island Trees School Board's violation of respondents' constitutional rights. In the alternative, this Court should affirm the decision below remanding the matter for a full trial.

Respectfully submitted,

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APPENDIX

APPENDIX

The Banned Books: Prizes, Awards, Recommendations, Favorable Professional Reviews and Listings

Fiction

THE FIXER by Bernard Malamud (1967)

Hardcover edition: Farrar, Straus & Giroux
Paperback editions: Dell; Pocket Books

- Pulitzer Prize in Letters (1967)
- National Book Award (1967)
- American Library Association/Best Books for Young Adults (1967)
- American Library Association/Outstanding Fiction for the College Bound (1976 and 1982)
- Citation for the National Book Award (Judges: John K. Hutchens, Mark Schorer, Anthony West):

  "We give the fiction award to Bernard Malamud's novel, of life in Czarist Russia, *The Fixer*: for the vitality and interest of its narrative; for the immediacy and importance of its theme; for the acuteness and maturity of its insights; for the warmth and humanity of its feeling; for the precision and clarity of its writing; and for the balance and sanity of its point of view.

  "We believe that there is a special cogency for Americans as for the inhabitants of all today's superstates in Mr. Malamud's story, concerned with the strains and anxieties that beset a man who finds himself a stranger in his community, and simultaneously a victim of the irrational preju-

dices of the crowd, and the arbitrary procedures of the agents of the remote and inaccessible state power which controls its destinies. We believe that in its bold attack on this theme, *The Fixer* upholds the tradition of immediacy which gave the novel much of its importance and its vitality in the past, which is its chief claim to our attention in the present, and its strongest hope for the future."

Favorable professional reviews and listings:

- School Library Journal, p. 268 (Oct. 15, 1966)
- Booklist, p. 237 (Oct. 15, 1966)
- Library Journal, p. 3470 (July 1966)
- Senior High School Library Catalog, p. 516 (10th ed. 1972)*

SLAUGHTERHOUSE - FIVE by Kurt Vonnegut, Jr. (1969)

Hardcover edition: Delacorte Press
Paperback edition: Dell

- National Book Award (nominee) (1970)
- National Institute of Arts and Letters (1970)
- Indiana Authors Day Award, Indiana University Writers Conference (1970)

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* It is also noteworthy, in view of the claimed effort to protect Jews from Mr. Malamud's book, that Malamud's earlier novel, *The Assistant,* won the "Brotherhood" Award of the National Conference of Christians and Jews in 1958. Under the terms of that award, the winning entry "must contribute to increased enlightenment, understanding, and respect for religious, racial, and nationality differences and the strengthening of a free and democratic society, based on the fundamental moral and ethical principles of all great religions." *Literary and Library Prizes,* 53 (R. R. Bowker, 9th ed. 1976). *The Assistant* also won the William and Janice Epstein fiction award, presented by the Jewish Book Council of the National Jewish Welfare Board. *Id.* at 114.

- American Library Association/Fifteen Years of Best Books for Young Adults (1975)
- American Library Association/Outstanding Fiction for the College Bound (1976 and 1982)

Favorable professional reviews and listings:

- School Library Journal, p. 462 (Jan. 15, 1969)
- Library Journal, p. 1021 (July 1, 1969)
- Senior High School Library Catalog, p. 537 (10th ed. 1972)

A HERO AIN'T NOTHIN' BUT A SANDWICH by Alice Childress (1973)

Hardcover edition: Coward, McCann & Geoghan
Paperback edition: Avon

- National Book Award (nominee/Children's Literature) (1974)
- Jane Addams Children's Book Award (honor book) (1974)*
- Woodward Park School Annual Book Award (1974)**
- American Library Association/Best Books for Young Adults (1973)
- American Library Association/Fifteen Years of Best Books for Young Adults (1975)

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* The Jame Addams Children's Book Award is sponsored jointly by the Jane Addams Peace Association and the United States Section of the Women's International League for Peace and Freedom. The Award is made "to encourage publication of books for children which are of literary merit and contain constructive themes" and that "best promote peace, the dignity and equality of all peoples, and social justice." *Literary and Library Prizes, supra,* at 263.

** The Woodward Park School Award is given "for the book for children which best demonstrates good human relations. Money is raised by the children of the school and given to an organization (designated by the winning author) which serves children." *Children's Books: Awards & Prizes* 109 (Children's Book Council 1979).

- School Library Journal/Best Books of the Year (1973)
- New York Times Book Review (Outstanding Books of the Year) (1973)

Favorable professional reviews and listings:

- Booklist, pp. 333, 336 (Nov. 15, 1973)
- Junior High School Library Catalog, p. 47 (Supp. 1974)
- Excerpt from *New York Times Book Review* (Nov. 4, 1973):

> "There are too few books that convince us that reading is one of the supreme gifts of being human. Alice Childress, in her short, brilliant study of a 13-year-old black heroin user, 'A Hero Ain't Nothin' But a Sandwich,' achieves this feat in a masterly way by telling a real story of the victims of today's worst urban plague, heroin addiction, and it reaffirms the belief that excellent writing is alive and thriving in some black corners of America."

Autobiographies

GO ASK ALICE (anonymous) (1971)

Hardcover edition: Prentice Hall
Paperback edition: Avon

- Christopher Book Award (1972)
- MAXI Award (1972)
- American Library Association/Best Books for Young Adults (1972)

- American Library Association/ Fifteen Years of Best Books for Young Adults (1975)
- School Library Journal/Best Books for Spring (1972)

Favorable professional reviews and listings:

- Booklist, p. 611 (Mar. 15, 1972); p. 633 (Apr. 1, 1972)
- Senior High School Library Catalog, p. 24 (Supp. 1973).

BLACK BOY by Richard Wright (1945)*

Hardcover edition: Harper & Brothers
Paperback edition: Harper & Row (Perennial Classic)

Favorable professional reviews and listings:

- National Council of Teachers of English/Booklist for Junior High School Students (1975)
- Senior High School Library Catalog, p. 419 (10th ed. 1972)
- American Library Association/Outstanding Biographies for the College Bound (1976 and 1982)

SOUL ON ICE by Eldridge Cleaver (1968)

Hardcover edition: McGraw-Hill
Paperback edition: Dell

- Martin Luther King Memorial Prize** (1970)

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* As an author, Wright won a prestigious Guggenheim Fellowship in 1939 (other winners that year were John Dos Passos, Harold Sinclair and Robert Penn Warren) and the NAACP Spingarn Medal for literary achievement (1941).

** The prize is awarded "for literary work reflecting the ideals to which Martin Luther King dedicated his life." *Literary and Library Prizes, supra,* at 414. (This is a British prize and was awarded to the British hardcover edition published by Cape.)

- American Library Association/Best Books for Young Adults (1968)
- American Library Association/Fifteen Years of Best Books for Young Adults (1975)

Favorable professional reviews and listings:

- School Library Journal, p. 150 (May 1968)
- Booklist, p. 1011 (May 1, 1968)
- Library Journal, p. 564 (Feb. 1, 1968)
- Senior High School Library Catalog, p. 42 (10th ed. 1972)
- Excerpt from a review by Robert Coles in the *Atlantic Monthly* (June 1968):

> "[Cleaver] has a sense of humor. He knows how to be astringent one minute, ironic the next. He can be tolerant and compassionate, far more so in my opinion than the man who wrote the introduction to this book. He is full of Christian care, Christian grief and disappointment, Christian resignation, Christian messianic toughness, and hope. He loves his lawyer, a white woman, and pours out his love to her in three beautiful, incredibly subtle and blunt and unsparing and unforgettable letters. How did he do it—learn to write, learn the really impressive theological subtleties that are addressed to his lawyer? (They remind one of Dietrich Bonhoeffer in jail, or Dostoevsky writing from the Underground.)"

DOWN THESE MEAN STREETS by Piri Thomas (1967)

Hardcover edition: Alfred A. Knopf
Paperback edition: Random House/Vintage

- American Library Association/Best Books for Young Adults (1967)

Favorable professional reviews and listings:

- School Library Journal, p. 3877 (Oct. 15, 1967)
- Library Journal, p. 1637 (Apr. 13, 1967)
- Booklist, p. 27 (Sept. 1967)

Anthologies

BEST SHORT STORIES BY NEGRO WRITERS edited by Langston Hughes* (1967)

Hardcover and Paperback editions: Little, Brown & Co.

(a collection of 47 short stories by noted black writers, including Ralph Ellison, Richard Wright, Frank Yerby, Jean Toomer, James Baldwin, Charles Chestnutt, and Paul Dunbar)

Favorable professional reviews and listings:

- School Library Journal, p. 1760 (Apr. 15, 1967)
- Library Journal, p. 595 (Feb. 1, 1967)
- Senior High School Library Catalog, p. 542 (10th ed. 1972)

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* As an author, Langston Hughes won a Guggenheim Fellowship (1935); a National Institute of Arts and Letters Award (1946); an Anisfield-Wolf Award (1953—for *Simple Takes a Wife*, published by Simon & Schuster) (sponsored by the Saturday Review and given to "the best work concerned with racial problems in the field of creative literature." *Literary and Library Prizes, supra*, at 37-38); and the NAACP Spingarn Medal (1960) (for literary achievement).

A READER FOR WRITERS edited by Jerome Archer* (1971)

Published by McGraw-Hill

(a collection of some 110 short essays or stories by noted writers, including John Updike, Mark Van Doren, Arthur Schlesinger, David Riesman, Samuel Johnson, Aldous Huxley, Robert Benchley, Francis Bacon, James Madison, Alexis de Tocqueville, Walter Lippman, C. P. Snow, Thomas Jefferson, Jonathan Swift, Joseph Conrad, James Thurber, E. B. White, and Lionel Trilling.)

— *See also* full Table of Contents at JA 132-137.

Non-Fiction

THE NAKED APE by Desmond Morris (1968)

Hardcover edition: McGraw-Hill
Paperback edition: Dell

• Library Journal, p. 91 (Jan. 1, 1968)

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* Jerome Archer is a Professor of English at Arizona University. He has been Chief Executive Officer of the Conference on College Composition and Communication and a Vice-President of the National Council of Teachers of English. Archer's anthology was not reviewed or listed in the standard school and school library media, apparently because the book was primarily distributed outside the high school market.

Office-Supreme Court, U.S.
FILED
DEC 28 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of The United States

October Term, 1981

NO. 80-2043

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT, NO. 26; RICHARD AHRENS, FRANK MARTIN, CHRISTINA FASULO, PATRICK HUGHES, RICHARD MELCHERS, RICHARD MICHAELS, AND LOUIS NESSIM;

Petitioners,

v.

STEVEN A. PICO, BY HIS NEXT FRIEND, FRANCES PICO; JACQUELINE GOLD, BY HER NEXT FRIEND, RONA GOLD; RUSSELL RIEGER, BY HIS NEXT FRIEND, SAMUEL RIEGER; GLENN YARRIS, BY HIS NEXT FRIEND, RICHARD YARRIS AND PAUL SOCHINSKI, BY HIS NEXT FRIEND, HENRY SOCHINSKI,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

NO. 80-2043

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT, NO. 26; RICHARD AHRENS, FRANK MARTIN, CHRISTINA FASULO, PATRICK HUGHES, RICHARD MELCHERS, RICHARD MICHAELS, AND LOUIS NESSIM;

Petitioners,

v.

STEVEN A. PICO, by his next friend, FRANCES PICO; JACQUELINE GOLD, by her next friend, RONA GOLD; RUSSELL RIEGER, by his next friend, SAMUEL RIEGER; GLENN YARRIS, by his next friend, RICHARD YARRIS and PAUL SOCHINSKI, by his next friend, HENRY SOCHINSKI,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH IN SUPPORT OF RESPONDENTS

Amicus supports the position of respondents and respectfully submits that the judgment of the United States Court of Appeals for the Second Circuit in the above-captioned case should be affirmed.[1]

1. *Amicus* has filed with the Clerk of the Court letters consenting to the filing of this brief from Lipp and Rubin, P.C., counsel for petitioners (the Board of Education, Island Trees Union Free School District No. 26 and the seven named individuals, who are members of the Board of Education of the District) and from Alan H. Levine and Arthur Eisenberg, counsel for respondents (Steven Pico, Jacqueline Gold, Russel Rieger, Glenn Yarris and Paul Sochinski, each of whom sues by a next friend).

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 638 F.2d 404 (1980). The order of the three-judge panel denying a petition for rehearing, the order of the active judges of the Court of Appeals for the Second Circuit denying a suggestion for rehearing en banc and opinions concurring in and dissenting from the denial of en banc consideration are reported at 646 F.2d 714 (1981). The opinion of the United States District Court for the Eastern District of New York is reported at 474 F. Supp. 387 (E.D.N.Y. 1979).

Interest of the Amicus Curiae

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of B'nai B'rith to advance goodwill and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States.

Among its other activities directed to these ends, the Anti-Defamation League has filed briefs *amicus curiae* in many cases, including *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Board of Education*, 347 U.S. 483 (1954); *N.A.A.C.P. v. Alabama*, 377 U.S. 288 (1964); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); and *Federenko v. United States*, 449 U.S. 490 (1981).

In this case, the Court is asked to decide whether a school board may remove books from a public secondary school library and from the curriculum, based on the board members' "personal values" and political ideologies, and on the school board's perceptions of the values held by the majority of residents in the community. This is an issue of national significance. "A censorial spirit is at work in the

United States, and for the past year or so it has focused more and more on books. Efforts to remove certain titles from school and public libraries, from paperback racks and bookstores, from the eyes of adults as well as children, have increased measurably." *The New York Times Book Review*, December 20, 1981 at p. 1.

Amicus is opposed to the unfettered exercise of such powers, based on its long-standing view that the best safeguards against bigotry are access to a wide body of opinions and an atmosphere conducive to full and free discussion of issues and ideas. *Amicus* submits that an affirmance in this case will enhance the learning and exchange of ideas, inculcate our youth with the values of a pluralistic political system and promote tolerance, openness and freedom in our society.

Questions Presented

1. Does a board of education violate the First Amendment when it prohibits the use, and thereby inhibits discussion of, certain books in the library and curriculum because the values represented in those books do not happen to conform to the personal ideologies of the school board members or to their perceptions of the values of a majority of the community?

2. When a board of education removes books from a school's library and curriculum in a manner and for reasons that violate the First Amendment, can it rely on other grounds which might have afforded a permissible justification were they the basis for its actions?

3. Do secondary school students have standing under the First Amendment to challenge the action of a board of education which bans certain books from their school library and prohibits their inclusion in the school's curriculum?

Statement of the Case

In September, 1975, three of the defendant members of the Board of Education of the Island Trees Union Free School District (the "Board"), including the Board's President and Vice-President, attended a conference sponsored by Parents of New York United (PONY-U), a "conservatively oriented parents group." 474 F. Supp. at 389. There they obtained what Board President Richard Ahrens described as "lists of books considered objectionable by some persons." 638 F.2d at 407.

On November 7, 1975, Ahrens and Board Vice-President Frank Martin searched the high school's library card catalogue for any of the "objectionable books," and found nine. Two others were found in subsequent searches conducted at the Board's direction.[2]

On February 24, 1976, following a "private session" of the Board at which the Superintendent of Schools and the principals of the senior and junior high schools were in attendance, the Board directed that the objectionable books be removed. Superintendent of Schools Richard Morrow sent the Board a memorandum discouraging the "banning" of books based strictly on "someone else's list." 638 F.2d at 409. Nonetheless, five days later, Morrow received a memorandum from Ahrens directing that "*all copies* of the library books in question be removed from the libraries to the board's office . . . ." (emphasis in original). Joint Appendix at 47. The Superintendent followed this order and removed all eleven books.

The Board explained its position in a press release issued March 19, 1976. Referring to the PONY-U conference, the Board stated that "at the conference, we learned of books

2. The eleven books are: *Slaughterhouse Five*, by Kurt Vonnegut, Jr.; *The Naked Ape*, by Desmond Morris; *Down These Mean Streets*, by Piri Thomas; *Best Short Stories by Negro Writers*, edited by Langston Hughes; *Go Ask Alice*, Anonymous; *Laughing Boy*, by Oliver LaFarge; *Black Boy*, by Richard Wright; *A Hero Ain't Nothing But a Sandwich*, by Alice Childress; *Soul On Ice*, by Eldridge Cleaver; *A Reader for Writers*, edited by Jerome Archer; and *The Fixer*, by Bernard Malamud.

found in schools throughout the country which were anti-American, anti-Christian, anti-Semetic [sic], and just plain filthy." 638 F.2d at 410.

The Board met again on March 30, 1976, ratified the directive removing the books from the library and appointed a Book Review Committee comprised of four parents and four staff members to read the books and make appropriate recommendations. On July 1, 1976, the committee rendered its final report. The committee recommended that five of the books be retained, that two books be removed, and that one be placed on the restricted shelf of the libraries, to be made available to students with parental approval only. The committee reached no decision as to the remaining three books.

The committee's recommendations were ignored by the Board. At a meeting on July 28, 1976, the Board voted to remove nine of the eleven books concerned "from . . . secondary libraries and for use in the curriculum," and to place one book on the restricted shelf. Only one of the eleven volumes originally removed by the Board was returned to the library on an unrestricted basis. 474 F. Supp. at 391.

The Board has in this litigation characterized its motivation principally in terms of the claimed vulgarity or explicitness of the material involved. Five of its members stated in deposition that they supported removal of certain volumes because the books contained "obscenities, were irrelevant to our curriculum, were inappropriate, and were in bad taste." Joint Appendix at 119-20; Affidavit in Support of Motion for Summary Judgment ¶ 4. These justifications, however, appear to be little more than afterthoughts. Prior to the report of its committee — which it disregarded — the Board's actions were based solely on the material handed out at the PONY-U conference. The Board itself undertook no analysis of the books in terms of their purported vulgarity. It also made no attempt to ascertain whether other books may have been

more vulgar than those removed and it conceded that the books which were removed were not actually obscene. 474 F. Supp. at 392.[3]

The true motivation of the Board is best evidenced by its contemporaneous statements and by candid admissions of some of its members. These point clearly to the conclusion that the Board banned books from the secondary school library and curriculum because of its own political and social philosophy and its belief that it was imposing the will of the majority of the school district's residents.

The list of objectionable books distributed at the PONY-U conference, on which the Board so heavily relied, contained editorial underlining of excerpts and comments which were undeniably political. For example, a comment on Eldridge Cleaver's *Soul on Ice* labeled it "full of anti-American material" and "seditious and disloyal matter." 638 F.2d at 407. And *Our Sexual Evolution*, by Helen Cotton, was deemed "anti-Christian and contrary to the laws of God. It has chapters on Group Marriage, Communes, Abortion, Contraceptives etc. It also promotes women's lib." *Id.* at 408.

Furthermore, Board President Ahrens plainly disclosed the political nature of the Board's decision in his affidavit submitted to the District Court:

> "I am basically a conservative in my general philosophy and feel that the community I represent as a school board member shares that philosophy. It is

3. Further evidence that the rationale for banning the books advanced by the Board in the course of this litigation may not reflect the basis on which it acted can be found in its treatment of the book *A Reader for Writers*. The list distributed at the PONY-U conference had included that book because, in one essay, it "equates Malcolm X, considered by many to be a traitor to this country, with the founding fathers of our country." Yet in this litigation, defendants Ahrens and Martin have contended that the Board's objection to the book (which was removed from the shelves solely on the basis of the PONY-U list) related to the presence of Jonathan Swift's classic satire "A Modest Proposal," in which Swift suggested ironically that the solution to Ireland's dual problems of overpopulation and starvation was to eat babies. 638 F.2d at 437 (Newman, J., concurring).

> to this that I attribute my re-election on a number of occasions. *I feel that it is my duty to apply my conservative principles to the decision making process in which I am involved as a board member. . . .*" Joint Appendix at 21; Affidavit of Richard J. Ahrens ¶2 ("Ahrens Aff.") (Emphasis added).

Ahrens characterized his re-election, together with that of other Board members, as a "complete vindication for and support of our stand concerning these books. We are representing the community which first elected us and re-elected us and our actions have reflected its intrinsic values and desires." Joint Appendix at 27; Ahrens Aff. ¶18.

18. And the Board as a whole conceded, in responding to an editorial criticizing the book ban, that "one of the purposes of a Board of Education is to see that local control is maintained and that the will of the majority prevails." Joint Appendix at 95.

Plaintiffs, who were students at the Island Trees secondary schools, commenced this action in 1976 to challenge the Board's book banning resolution and to compel restoration of the books to the library and the curriculum. The District Court granted the Board's motion for summary judgment, denied plaintiffs' cross-motion for summary judgment and dismissed the complaint. A divided Second Circuit reversed and remanded the case for trial on the merits of plaintiffs' constitutional claims. Thereafter, the Board's motion for rehearing was denied by the three-judge panel, and an evenly divided panel of the active Judges of the Circuit effectively denied en banc consideration. This Court granted certiorari on October 13, 1981.

Summary of Argument

The action of the Island Trees Board of Education in removing certain books from the school library and banning their use in the curriculum is unconstitutional, because it seeks to impose the political and social views of

the board members and a purported majority of community residents on students at the school by condemning certain ideas and effectively removing them from the realm of debate. This casts a pall of orthodoxy on the educational process which this Court has deemed impermissible.

The Board's impermissible motive infects the ban; its action cannot be rectified by a judicial determination that the Board's action might have been justified on some other ground.

The student plaintiffs have standing in this case because they suffer the direct impact of the Board's constitutional violation, whether it be termed an infringement of the students' "right to know" or the impermissible imposition of a pall of orthodoxy on the curriculum in their schools.

ARGUMENT

POINT 1

THE ISLAND TREES SCHOOL BOARD VIOLATED THE FIRST AMENDMENT BY BANNING CERTAIN BOOKS FROM THE SCHOOL LIBRARY AND CURRICULUM

Among the most precious and meaningful rights in any true democratic society are the rights to express and have access to the full spectrum of political and social thought. As is shown below, the book ban ordered by the petitioners in this case violates the First Amendment because it was intended to and did cast a pall of orthodoxy on the Island Trees Free Union School District, excluding ideas simply because they did not conform to the ideological beliefs of the Board's members and, in their opinion, of the people they represented.

A. Banning Books in a Manner Which Casts a Pall of Orthodoxy Violates the First Amendment

A board of education is charged with the power and duty to formulate educational policy which, at the elementary and secondary school level, necessarily includes indoctrination of one sort or another. In determining the education and the indoctrination that its students are to receive, a school board unquestionably has wide latitude. *Swann v. Board of Education*, 402 U.S. 1, 16 (1972); *James v. Board of Education*, 461 F.2d 566, 573 (2d Cir. 1972).[4]

This does not mean, however, that a school board may ignore the First Amendment. It is now over a decade since this Court held that neither "students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969). Previously, a line of cases had established that members of a school community have the right to be free from a "pall of orthodoxy," whether that pall be cast by teachers or officials and whether its hue is political, social or religious. *See Epperson v. Arkansas*, 393 U.S. 97 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

Although these cases do not address the precise issue now before this Court,[5] they stand firmly for the proposition

4. The precise contours of a school board's right to indoctrinate students present issues which are not affirmatively before the Court and need not be addressed in this case.

5. Lower courts which have confronted this issue have reached varying results. Overturning book bans, in addition to the Court of Appeals below, were: *Minarcini v. Strongsville City School District*, 541 F.2d 577, 582 (6th Cir. 1976) (school board may not remove books from the school library or the curriculum merely because it finds them objectionable in content on the basis of its own political or social tastes); *Salvail v. Nashua Board of Education*, 469 F. Supp. 1269 (D.N.H. 1979) (removal of magazine on basis of content not supported by substantial governmental interest); *Right to Read Defense Committee of Chelsea v. School Committee of Chelsea*, 454 F. Supp. 703 (D. Mass. 1978) (school committee's removal from library of anthology with "offensive" language violated

that a school board violates a student's First Amendment right to be free from the "pall of orthodoxy" where it seeks to indoctrinate or inculcate values by condemning and excluding ideas it does not wish to promote. As stated by Judge Newman, concurring in the Court of Appeals: "It is one thing to teach, to urge the correctness of a point of view. But it is quite another to take any action that condemns an idea, that places it beyond the pale of free discussion and scrutiny." 638 F.2d at 432-33.

For example, in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), this Court struck down regulations in New York which prohibited the appointment and retention of "subversives" as superintendents, principals, teachers or other employees in public schools. The Court's principal concern was that the vagueness of the term "subversive" would lead to self-censoring by teachers, the result of which would be to deprive students of exposure to ideas:

> " 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' . . . The classroom is peculiarly the 'marketplace of ideas.' The Nation's future

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students' "right to read and to be exposed to controversial thoughts and language").

Even those courts which have upheld book removals have recognized that the right of school officials to make curriculum and library procurement decisions ends where the potential for a pall of orthodoxy begins, but they draw the line elsewhere. *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300 (7th Cir. 1980). See also *Cary v. Board of Education*, 598 F.2d 535, 544 (10th Cir. 1979) (ban of use of certain books lawful where parties stipulated "no systematic effort was made, to exclude any particular type of thinking or book").

The Second Circuit, in a case decided before the present one, upheld the removal of a book from the school library noting that "there was no showing of a curtailment of freedom of speech or thought." *Presidents Council, District 25 v. Community School Board No. 25*, 457 F.2d 289, 293 (2d Cir.) *cert. denied*, 409 U.S. 978 (1972). As Judge Newman explained in his concurrence in the Court of Appeals decision in this case, only one book had been removed, the reasons for removal were the presence of obscenities and explicit sexual interludes, and no political motivation for the removal was shown or even alleged. 638 F.2d at 435.

> depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues', [rather] than through any kind of authoritative selection. . . ." 385 U.S. at 603 (citations omitted)

Similarly, in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), a compulsory flag salute procedure in the schools was held unconstitutional. The Court cited the coercive nature of the requirement, which it found would elevate one set of beliefs not through intellectual argument and discussion but through the debasement of other views. "If there is any fixed star in our constitutional constellation," wrote the Court, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . . " 319 U.S. at 642.

In that very same case this Court also held that actions which result in the impermissible exclusion of ideas from the schoolhouse do not become proper merely because they are supported or demanded by a majority of people in a school district or a state. At the heart of the First Amendent is the precept that the majority does not rule where the expression of ideas and beliefs is at issue:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's rights to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Id.* at 638.[6]

6. The Court has steered the same course in balancing rights in the context of public schools where the challenge is based on the First Amendment's establishment clause. Thus, *Epperson v. Arkansas*, 383 U.S. 97 (1968), held unconstitutional an Arkansas statute which prohibited public school teachers from teaching the Darwinian theory of evolution because the theory conflicted with certain religious beliefs.

Given the setting of each of these cases in the public school, and given this Court's previously expressed view that students in public schools have First Amendment rights (*Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969)), there is no reason these principles should not apply to the action of a school board in removing books from a school library or curriculum. To be sure, in a secondary school those rights must necessarily be subject to the need for decorum and the rights of other students to learn in a conducive environment. *Id.* Nor could one quarrel with a school board's decision to refrain from ordering books or to remove them from the curriculum for financial reasons (*Epperson v. Arkansas*, *supra*, 393 U.S. at 111 (Black, J., concurring)) or because they are obscene (*Miller v. California*, 413 U.S. 15 (1973)). But a determination which embodies a value judgment that materials have no place in a school, simply because they contain thoughts or ideas different from those held by the board or the community at large, imposes a pall of orthodoxy on the school curriculum, and thus runs afoul of the First Amendment as it has been consistently interpreted by the decisions of this Court.

B. The School Board's Actions Here Cast an Impermissible Pall of Orthodoxy

In this case, the Board's action in banning books already in circulation in the school library—and in one instance assigned reading for a course—was openly motivated by political considerations and was tantamount to censorship of the books and the ideas contained in them.

Petitioners proclaim to this Court without qualification that they are "unashamedly and unabashedly conservative in the traditional and generic sense of the word." Petitioners' Brief at 39. Petitioners' political orientation is itself irrelevant and a matter of no concern to the Court. But by

their own assessment, petitioners' political philosophy permeated every aspect of their functioning as members of the board, including the "establishment of curriculum." *Id.* And the record in this case leaves little doubt that the Board's decision to exclude books from the library and curriculum was a product of its political ideology which—whether it be liberal, conservative or otherwise—cannot be used by a school board as a basis for excluding books espousing a contrary view.

The Board's actions were not prompted by any evaluation of its own of the books used in the school system, but rather by a list provided at a politically-oriented conference. That list found books "objectionable" primarily because they expressed unorthodox ideas; indeed, several of the books ultimately removed were singled out because they purportedly contained "anti-American" or "anti-religious" ideas. See pp. 4 to 7, *supra*. Although the Board went through the pretense of establishing a procedure for independent review of the books, it ultimately ignored the recommendations of the committee of parents and educators it had appointed, and it reaffirmed its prior decision to remove virtually all of the books which had appeared on the list.

Furthermore, the Board and its members made no secret of their intentions. To the contrary, they made clear to the public the political underpinning of the Board's action, and the significance of the book ban, by issuing press releases—which referred to the conference and labelled the books, among other things, "anti-American"—by conducting a survey on the book banning, and by making the ban a central issue in the Board's election campaign. 638 F.2d at 409-12.

In this atmosphere and with the Board's publicly stated intent, the impact of the book ban could hardly have been a matter of speculation. It communicated to the students

and their teachers that ideas contrary to the political philosophy of the Board were taboo in the public school system. And it imposed an orthodoxy of political thought which does not warrant—and under the precedents of this Court does not have—the sanction of the Constitution.

It is no answer to this to suggest that the First Amendment has not been offended because the Board's ban does not, on its face, preclude discussion of the books or comment on the ideas and positions they contain. Petitioners' Brief at 4. It is now beyond dispute that "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963). In addition, "[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions." *Id.* "The danger of that chilling effect upon the exercise of First Amendment rights must be guarded against by sensitive tools. . . ." *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967).

The "chilling effects" of the Board's order in this case on teachers and students are not difficult to imagine. At a minimum, a teacher would be seriously hindered in conducting a full and open discussion of a book which he is forbidden to assign and which even the curious and intellectually challenged students would not find accessible in the school library. More likely is the possibility that teachers would engage in no such discussions for fear of losing their jobs. And impressionable students might easily conclude that books whose very presence on the library shelves is perceived as inappropriate by elected community officials must contain ideas so repugnant as not to be fit subjects for debate, assuming, of course, that the existence of the banned books ever became known to them.

That official disapproval of ideas can be communicated effectively even if subtly has prompted this Court to be especially wary of governmental action when First

Amendment rights are implicated. See, *e.g.*, *N.A.A.C.P. v. Button*, *supra*. The Board's resolution here does not explicitly ban the discussion of the books, but for all practical purposes achieves the same result and thus impermissibly restricts First Amendment rights.

POINT 2

THE SCHOOL BOARD'S POLITICALLY-MOTIVATED BAN CANNOT BE SAVED BY THE EXISTENCE OF FACTORS THAT MIGHT OTHERWISE HAVE JUSTIFIED IT

Petitioners, invoking Judge Mansfield's dissent below (638 F.2d at 419), claim that vulgar language and sexual explicitness in the books they banned justify their actions even though they were prompted to act by political considerations. This argument not only is contrary to the views this Court has espoused on First Amendment issues but, if accepted, would require the judiciary to perform the powers of a school board in each and every litigated case.

As has already been indicated in Point 1 (see pp. 8 to 15, *supra*), this Court, recognizing the existence of a "chilling effect," has repeatedly held that ambiguous and overbroad regulation will not be tolerated where First Amendment rights are involved. As was stated in *N.A.A.C.P. v. Button*, 371 U.S. 415, 432 (1963):

> "If the line drawn by the decree between the permitted and prohibited activities . . . is an ambiguous one, we will not presume that the statute curtails constitutionally protected activity as little as possible. For standards of permissible statutory vagueness are strict in the area of free expression. Furthermore, the instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other

> factual contexts besides that at bar." 371 U.S. at 432 (citations omitted).

See also Thornhill v. Alabama, 310 U.S. 88, 98 (1940) ("[w]here regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or evidence under it, which prescribes the limits of permissible conduct . . .").

The same policy that underlies this Court's practice of invalidating actions that have a chilling effect on First Amendment rights also dictates that a book ban that was ordered for impermissible reasons—as this one was—cannot stand, even if other reasons justifying the ban might also have existed. Politically motivated bans are improper because they have an inhibiting effect on the dissemination of ideas which do not conform to those of the governing body. This is no less the case where "mixed motives" are claimed to have inspired the ban or where arguably permissible reasons are advanced after-the-fact. In the latter situation, retroactive validation of an unconstitutional action could also have the undesirable consequence of encouraging the practice of banning first and casting about for an acceptable reason later.[7]

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7. This Court's decision in *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977), does not, as the Board suggests, compel a contrary result. There, an untenured school teacher sought reinstatement and back pay, claiming that his First Amendment rights were violated by the Board's refusal to rehire him. The District Court found for the teacher because the decision was based in part on constitutionally protected conduct—the school teacher's comments about a memorandum relating to teacher dress and appearance. The court also found, however, that the teacher had engaged in conduct which in fact provided the board with reasons for not rehiring him.

This Court held that if the board would have in fact reached the same decision in the absence of the protected conduct, the Constitution was not violated in a manner necessitating remedial action. Otherwise, the Court reasoned, an employee could maneuver himself into a better position merely by exercising his constitutional rights. Accordingly, the case was remanded for a determination of that issue. *(footnote continued)*

Moreover, recognition that a school board might rely on new bases for its action would lead to the very sort of intervention in school affairs the Board decries in this case. Judge Mansfield based his dissent on extensive quotation from the banned books and his conclusion that they contained vulgarities, profanities and sexual descriptions which would have given the Board a sufficient basis for restricting access to the books. But Judge Mansfield's analysis cannot substitute for that of the Board. Whether a book is suitable for public school students as an educational matter is an issue which, within constitutional limits, is generally committed to the discretion of local school boards. Here, at the time the ban was imposed, the Board made no analysis such as the one Judge Mansfield undertook later. For the courts to do so after litigation has already been commenced would put them in "the role of super board of education for every school district in the nation." *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 237 (1948).

The function of the courts in reviewing a decision by a school board to ban books is limited to determining whether the Board's action was intended to condemn certain ideas or censor the expression of beliefs in a manner that violates

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Mt. Healthy does not apply here for three reasons. First, there is no issue in this case as to causation. There is no evidence in the record that the Board discussed, analyzed or debated concerns about vulgarity or sexual explicitness when it met and resolved to ban the books.

Second, the balance of interests weighs far more heavily here on the side of First Amendment rights. Competing with the right to free speech in *Mt. Healthy* was the strong interest of the school board in not returning an unfit teacher to the classroom. This hardly compares with any alleged harm that might result from the presence of vulgar material in a book in the school library. Moreover, any contention by the Board that the vulgarity and sexual explicitness of the books render them unsuitable for educational purposes should be considered in the context that those concerns were at best peripheral to the Board's initial determination.

Finally, the Court's concern in *Mt. Healthy* with the teacher's ability to maneuver himself into a better position obviously has no analogue here. Books can hardly maneuver themselves into a better position by exercising First Amendment rights.

the First Amendment. The evidence in the record supports the conclusion that such impermissible motives entered into the Board's decision in this case. It is neither necessary nor appropriate for the judiciary to carry the inquiry any further.

POINT 3

STUDENTS OF THE ISLAND TREES SECONDARY SCHOOLS HAVE STANDING TO CHALLENGE THE BOARD'S BOOK BANNING RESOLUTION

The general principles governing standing have frequently been articulated by this Court. Plaintiffs have standing if they have suffered "some threatened or actual injury resulting from the putatively illegal action" (*Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973)) and if the "provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Students and their parents have specifically been accorded standing to challenge school policies which are alleged to have violated basic constitutional rights. See *Abington School District v. Schempp*, 374 U.S. 203, 224 n. 9 (1963).

Under these principles there should be no question whatsoever that the plaintiffs in this case, who are secondary school students in the Island Trees Free Union School District, have standing to challenge the order of the Board which removed books from their library and prevented their use in the curriculum. The First Amendment gives the students a right to be free from a pall of orthodoxy. The challenged action — removal of the books from the school library and curriculum — infringes that right and causes them direct and immediate injury.

Moreover, it is the students who are best situated to enforce these rights. It may be of little concern to an author that his or her book was removed from the library shelves of one secondary school. And teachers may be

reluctant to challenge such activities out of fear that it would jeopardize their employment.

The Board argues that its secondary students do not have a "right to know," as that concept was discussed in *Virginia State Board of Pharmacy v. Virginia Consumers Council, Inc.*, 425 U.S 748 (1976), because, for some unexplained reason, that right applies only to "commercial speech." Also advanced is the proposition that a "right to know" requires the existence of a reciprocal "right to speak," that the books in this case do not themselves have a right to speak and that, therefore, the predicate for a right to know does not exist. On the basis of these arguments, the Board contends that the students who commenced this suit have no standing to challenge its actions.

But the right asserted by the students in this case is the right to be free from the pall of orthodoxy—which would exclude from the classroom a whole range of political and social ideas—and not simply the right to know what is in particular books which have been banned. This right to be free from the pall of orthodoxy was recognized by this Court long before its decision in the *Virginia State Board of Pharmacy* case. See, *e.g.*, *Keyishian v. Board of Regents*, *supra*, and *West Virginia Board of Education v. Barnette*, *supra*.

Even if the only right involved here was a student's "right to know," that right was plainly violated by the Board's book banning order. The suggestion that the *Virginia State Board of Pharmacy* case establishes a right to know applicable only to commercial speech, and not to information relating to social and political values and ideas, has no validity whatsoever; if anything, commercial speech would be entitled to a *lesser* degree of protection than, for example, political communication. *Virginia State Board of Pharmacy* was but one in a line of cases in which this Court has recognized the existence of a generalized right to know information. In *Kleindienst v. Mandel*, 408 U.S. 753 (1972), for example, this Court recognized the

right of individuals to "receive information and ideas" from an alien; and in *Lamont v. Postmaster General*, 381 U.S. 301 (1965), it upheld the right to receive political publications sent from outside the United States.

These cases also dispose of petitioner's contention that there can be no "right to know" without a reciprocal right to speak, since in both, the person or entity seeking to communicate political ideas was an alien, with no protectible First Amendment rights.

CONCLUSION

The need for free and open discussion of all sides of all issues is not merely a matter of abstract theory. "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

The Island Trees Board of Education has unconstitutionally acted so as to restrict this process of inquiry and growth in its public schools.

Amicus urges that the judgment of the Court of Appeals reversing the District Court's grant of summary judgment to the Board, be affirmed.

Respectfully submitted,

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Office - Supreme Court, U.S.
FILED
DEC 31 1981
ALEXANDER L. STEVAS
CLERK

(Submitted Upon Consent of the Parties)

No. 80-2043

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT No. 26, *et al.*,

Petitioners,

v.

STEVEN A. PICO, *et al.*,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

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BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

Interest of the Authors League

The Authors League is the national society of professional authors and dramatists. One of its principal purposes is to express the views of its 10,000 members in cases involving freedom of expression.

The Authors League believes that the Petitioner—School Board's order removing seven books from its high school libraries violated the First Amendment rights of students, teachers, librarians, authors and publishers. It also believes that the proliferation of such book-banning orders

is one of the most serious threats to freedom of expression in the United States.

Consequently, the Authors League—with the consent of the parties—files this brief *amicus curiae* urging the Court to rule that respondents Pico, *et al.*, were entitled to judgment ordering the Island Trees School Board to rescind its ban and return the books to its libraries' shelves or, in the alternative, to affirm the decision of the Court of Appeals remanding the case for trial.

Summary of Argument

The School Board's order removed from its libraries seven books* that many librarians, teachers and critics found to be works of serious literary, artistic and social value. Their values, and the preeminence of several of the banned authors, however, simply highlight the dangerous consequences of the Board's order, Judge Mansfield's dissenting opinion, and the prior decision in *President's Council District 25* v. *Community School Board* No. 25, 457 F.2d 289 (2d Cir. 1972), cert. denied, 409 U.S. 998 (1972).

The Authors League agrees with respondents that the Board's order violated the First Amendment and deprived students of their constitutional right of access to the books in their high school libraries. Respondents' brief discusses the issues thoroughly and most competently, and we will not burden the Court with a prolonged reiteration of the

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* THE FIXER (Bernard Malamud); SLAUGHTERHOUSE FIVE (Kurt Vonnegut); THE NAKED APE (Desmond Morris); DOWN THESE MEAN STREETS (Piri Thomas); BEST SHORT STORIES BY NEGRO WRITERS (Ed., Langston Hughes); GO ASK ALICE (anon.); A HERO AINT NOTHING BUT A SANDWICH (Alice Childress); and A READER FOR WRITERS (ed., Jerome Archer).

arguments, authorities and quotations which support their conclusions.

We do wish to discuss these points:

1. That in view of the First Amendment purposes of school and public libraries, a school board is constitutionally precluded from removing non-obscene books from libraries unless it establishes that the sole reasons for removal were "neutral in First Amendment terms." The Island Trees Board's reasons did not constitutionally entitle it to ban the seven books.

2. Restraints on the circulation of books by libraries and bookstores violate the First Amendment rights of their authors and publishers.

3. Denial of First Amendment protection against the School Board's order will stimulate censorship in school and public libraries—one of the most dangerous threats to the freedoms to publish, distribute and read books, and to spirit of the First Amendment.

POINT I

The First Amendment Function of School Libraries Precluded the Board From Removing the 7 Books.

This appeal does not involve issues concerning the selection or replacement of textbooks. The 7 banned books were library books, not textbooks. Nor does the appeal raise issues concerning a Board's discretion in purchasing books for its libraries. The 7 books already were owned by the District and on the libraries' shelves before this Board acted. Presumably the books had been acquired by the District's professional staff under the aegis of a prior Board.

The primary issue, therefore, is whether the Board was constitutionally precluded from *removing library books* from the collection of its high school library, for the reasons it asserted. This issue, we submit, must be considered in the context of the library's First Amendment function.

(i) *School Libraries Are First Amendment "Marketplaces of Ideas"*

The Island Trees high school library is, like all school and public libraries, "a mighty resource in the marketplace of ideas." *Minarcini, et al.* v. *Strongsville City School District,* 541 F.2d 577, 583 (6th Cir. 1976). Indeed, every library is the quintessential "marketplace of ideas." Within the constraints of its budget, its very purpose is to provide the widest possible range of books, and diversity of expression, ideas and opinions. And so too, "it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas *(Red Lion)* . . ." which is based on "the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . *(Associated Press)*." *Red Lion Broadcasting Company, et al.* v. *Federal Communications Commission, et al.,* 395 U.S. 367, 386 (1969); *Associated Press, et al.* v. *United States,* 326 U.S. 1, 20 (1945).

The necessity of preserving full First Amendment protection for the school library *qua* "marketplace of ideas" is emphasized by this Court's statement that nowhere is that protection "more vital than in the community of American schools" to assure "wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'" *Keyeshian* v. *Board of Regents,* 385 U.S. 589, 603 (1967).

(ii) *The Board Could Not Remove Books Because It Judged Their Contents Unsuitable*

The Board objected to political, social and religious views expressed in various of the books. This was one of its two justifications for removing them. But it is precisely the purpose of the school library, and the First Amendment, to provide works "antagonistic" to the individual views of Board members and those held by the majority which elected it, as well as books they approve of. The Board's order thus struck at the heart of the First Amendment and the library-marketplace of ideas. It also taught the District's students an egregious lesson . . . contempt and distrust of the fundamental principles of the First Amendment.

Judge Mansfield reasoned that no First Amendment restraint occurred because students were free to discuss the ideas in the banned books, although they could not obtain copies from the library. We disagree. Students were entitled to the First Amendment privilege of reading the authors' expressions of their ideas, opinions and experiences—of acquiring the information, first hand, and judging it themselves. Moreover: the First Amendment protects books and the right to read them, and is not limited to "ideas" they express. The banning order, moreover, was a direct assault on the library's First Amendment function; and it denied a minority, those who wanted to read the books, the right of access to them in the library.

(iii) *The Board Could Not Remove the Books Because of Vulgar or Offensive Language*

None of the books violated New York's statute banning material obscene for minors. The Board, however, concluded that passages containing the word "fuck" and other language it deemed vulgar, and some references to sexual

intercourse, justified removal of the books from the high school library. We submit the Board erred, as did the Court of Appeals in *President's Council District 25, supra.*

If vulgar language or passages on sexual conduct warranted banning books from libraries, a vast array of classics and contemporary works of merit could removed—particularly if school boards applied the policy even-handedly rather than as a pretext for banning books they objected to for other reasons.

Here, the Board was not formulating regulations to prevent high school students from uttering in public places the "four-letter" words many had long-since learned outside the school. The Board was dealing with words printed in books; words and passages reflecting the speech, behavior and experiences of characters, or authors. The First Amendment requires that books be judged as a whole in determining if they are obscene. Certainly, it requires that *non-obscene* books be judged as a whole, when attempts are made to ban them from libraries because of vulgar language or references to sexual intercourse. Judged as a whole, the 7 banned books are works of serious social, literary and artistic value. The First Amendment protects them against restraints on their circulation by the high school library.

(iv) *The Board's Reasons for Banning the 7 Books Were Not "Neutral in First Amendment Terms"*

The Authors League submits that the Court of Appeals, in *Minarcini, et al.* v. *Strongsville City School District, supra,* correctly ruled that a Board could remove books from school libraries only for reasons that were "neutral in First Amendment terms"—wear and tear, obsolescence, or legitimate shortage of shelf space—and not because of any objection to content. Since the actual reasons for

school-board banning orders usually are objection to content, which might easily be concealed behind the pretext of a "neutral" rationalization, we submit that the First Amendment requires a Board to prove by clear and convincing evidence, that it actually ordered a book removal solely for "neutral" reasons—when its order is challenged by students, teachers, parents or others with standing.

POINT II

The Board's Order Violated the First Amendment Rights of Authors and Publishers of the 7 Books.

Bookstores and libraries are indispensable links in the chain of communication between authors and publishers, and those who read their books. Freedom to write and publish a book, and to read it, would be empty formalities if police, district attorneys or school boards could prevent booksellers and libraries from keeping the book on their shelves and distributing it. Therefore, the Court has ruled that the First Amendment's protection "embraces the circulation of books as well as their publication" (*Bantam Books* v. *Sullivan*, 372 U.S. 48, 65; *1963*), and that it protects those who distribute books as well as authors and publishers. (*Smith* v. *California*, 361 U.S. 147, 152; *1959*).

And because restraints on those who circulate books—wholesalers, stores or libraries—also inhibit the rights of the authors and publishers of those works, the Supreme Court has held that they may sue to prevent these unconstitutional restraints on "the circulation" of their books. *Bantam Books* v. *Sullivan, supra.*

The Board's order—officially branding the 7 books unsuitable for high school students—also could inhibit their circulation in other channels. Students may be deterred from buying the books in stores, stores deterred from

stocking them, or parents influenced to prohibit them to their children of high school age. Cf. *Lamont* v. *Postmaster General*, 381 U.S. 301, 309 (1965); *Bantam Books* v. *Sullivan, supra*, p. 67.

POINT III

Denial of First Amendment Protection Against the Board's Order Will Stimulate Censorship of School and Public Libraries.

Book banning, like witch-hunting, is contagious. In *Right to Read Defense Committee, et al.* v. *School Committee of the City of Chelsea, et al.*, 454 F. Supp. 703 (D. Mass. 1978), the District Court said:

> "If this work may be removed by a committee hostile to its language and theme, then the precedent is set for removal of any other work. The prospect of successive school committees 'sanitizing' the school library of views divergent from their own is alarming, whether they do it book by book or one page at a time." (454 F. Supp., at p. 714.)

As in the Soviet Union, books will become non-books depending on a new board's lack of tolerance and respect for the principles of the First Amendment.

The banning of a book by one school board will lead to its banning by other boards. The pressures for such censorship are easy to generate. They will be difficult for many boards to resist if courts conclude the First Amendment does not prohibit school or library officials from removing books that offend their own tastes and sensibilities, or those of special interest groups. Inevitably, some boards and librarians will tend to "steer clear" of authors and titles who have been banned elsewhere.

Such censorship at the school board and library board level is one of the most serious threats to the freedoms to publish, distribute and read books. Usually its victims are works of recognized merit by authors of ability and distinction—as is the case here. (A record of contemporary book-banning is published bimonthly in The American Library Association's NEWSLETTER ON INTELLECTUAL FREEDOM.)

First Amendment protection against such book-banning, exemplified by the Island Trees Board's order, is essential to permit school and public libraries to continue functioning as First Amendment "market-places of ideas", disseminating a wide diversity of books, many of them "antagonistic" to the views of the incumbent school board and the majority that elected it.

CONCLUSION

It is respectfully submitted that the School Board's order violated the First Amendment and should be set aside, or in the alternative that the Order of the Court of Appeals should be affirmed.

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December 29, 1981

Office - Supreme Court, U.S.
FILED
NOV 30 1981
ALEXANDER L. STEVAS
CLERK

CASE NO. 80-2043

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Board of Education,
Island Trees Union Free
School District No. 26, et al.

Petitioners

v.

Steven A. Pico, et al.

Respondents

On Writ of Certiorari to the
United States Court of Appeals
For the Second Circuit

Brief for Amici Curiae Charles H Keating, Jr. and Citizens for Decency through Law, Inc. in Support of the Petitioners

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Brief of Amici Curiae in
Support of the Petitioners

QUESTIONS PRESENTED

1. Whether the local School Board's right to manage and control the schools within its district is greater than the limited First Amendment rights of junior high and high school students in a public school system, particularly where the students' exercise of their own freedom of speech is not directly implicated by the

retention or removal of school library books?

2. Whether junior high and high school students in a public school system do not have a sufficient First Amendment interest in order to be entitled to procedural due process on the issue of the retention or removal of school library books?

SUMMARY OF ARGUMENT

The school Board's right to manage and control the public schools within its district takes precedence over the limited First Amendement rights of students particularly where, as here, the students' exercise of free speech is not directly implicated by the removal of school library books. Although Tinker v. Des Moines School District, 393 U.S. 503 (1969) recognized students' First Amendment rights inside as well as outside school, those rights are not unlimited nor do they extend as far as

adults' rights in the "marketplace of ideas." Even in Tinker, this Court stated that a student's First Amendment rights had to be "applied in light of the special characteristics of the school environment." Id., at 506.

In the instant case, the students' free speech rights are not only limited but they are also not directly implicated. No student has been refused permission to exercise his right to speak. The students and teachers are free to discuss the ideas raised in the removed books and the books themselves. There has been no suppression of ideas.

The record is clear that the School Board removed all but one of the books from the school library because they "contained indecent matter, vulgarities, profanities, explicit sexual descriptions or allusions, sexual perversion, or disparaging remarks about Blacks, Jews, or Christ." Pico v. Board

of Education, Island Trees Union Free School District No. 26, 638 F.2d 404 (2nd Cir. 1980) (Mansfield, C.J., dissenting). The majority of the court below apparently believes that if the School Board in fact was motivated by its members' political beliefs, then their action in removing the books somehow rose to the level of a constitutional violation. However, the decisions of the Tenth and Seventh Circuits and other decisional law in the Second Circuit have not so held. Cary v. Board of Education, 598 F.2d 535, 544 (10th Cir. 1979); Zykan v. Warsaw Community School Corporation, 631 F.2d 1300, 1305 (7th Cir. 1980); Presidents Council District 25 v. Community School Board No. 25, 457 F.2d 289, cert. denied 409 U.S. 998 (1972). See also Bicknell v. Vergennes Union High School Board of Directors, 638 F.2d 438 (2nd Cir. 1980).

Nevertheless, whether or not the School Board was in fact motivated by its members' political beliefs is not dispositive. The School Board's power and right to select textbooks, set the curriculum, and in general, manage and control the schools, including the school libraries, is paramount especially where the books removed contain obscenities, vulgarities, and religious and ethnic slurs and particularly where, as here, there has been no suppression of views. Speculation over possible political motivations in the removal of books containing indecent material is the exhaltation of form over substance.

The School Board's right must take precedence over the students' limited First Amendment rights. The school board has broad powers to remove books and set the curriculum as long as its actions are not for the purpose of

promoting a certain religion nor for the purpose of suppressing a particular point of view. The state via the School Board has a legitimate and strong interest in the protection of young people. The removal of the books was not a suppression of the content of speech; it was merely a restriction on the form the speech took. Thus, in balancing all of the factors to be considered, the School Board's right to manage and control the schools, which includes the supervision of the school libraries, clearly outweighs the limited First Amendment rights of the students.

Because of the nature of their limited interest, the students were not entitled to procedural due process on the issue of the retention or removal of the school library books. Even though the students had no right to demand it, procedural due process was complied with. The procedure adopted by the

School Board in the case at bar was reasonable, rational, and adequate to protect the limited First Amendment rights of the students.

LAW AND ARGUMENT

Proposition of Law No. 1

THE LOCAL SCHOOL BOARD'S RIGHT TO MANAGE AND CONTROL THE SCHOOLS WITHIN ITS DISTRICT IS GREATER THAN THE LIMITED FIRST AMENDMENT RIGHTS OF JUNIOR HIGH AND HIGH SCHOOL STUDENTS IN A PUBLIC SCHOOL SYSTEM, PARTICULARLY WHERE THE STUDENTS' EXERCISE OF THEIR OWN FREEDOM OF SPEECH IS NOT DIRECTLY IMPLICATED BY THE RETENTION OR REMOVAL OF SCHOOL LIBRARY BOOKS.

In Tinker v. Des Moines School District, 393 U.S. 503 (1969), this Court's authoriative decision recognized students' First Amendment rights inside school as well as outside by stating the now often quoted phrase: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of

speech or expression at the schoolhouse gate." Id., at 506. However, students' First Amendment rights are not unlimited nor do they extend as far as adults' rights in the "marketplace of ideas." Even in the cornerstone case of Tinker, supra, a student's freedom to express his opinions was limited by his doing so without

> "'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others. * * * But conduct by the student, in class or out of it, which for any reason - whether it stems from time, place, or type of behavior - materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. * * *"
>
> 393 U.S. at 513. (citations omitted).

In addition, this Court stated that a student's First Amendment rights had to

be "applied in light of the special characteristics of the school environment." Id., at 506. (emphasis supplied).

Some of the "special characteristics" found in a "school environment" include the authority of the state "to transmit the basic values of the community," James v. Board of Education, 461 F.2d 566, 573 (2nd Cir.), cert. denied 409 U.S. 1042 (1972), and the duty of the school to fulfill its "responsibility to promote standards of decency and civility among school children," Thomas v. Board of Education, 607 F.2d 1043, 1057 (2nd Cir. 1979). In Thomas, the Second Circuit recognized the qualified freedom of speech rights of students when it stated: "School officials must have some latitude within the school in punishing and prohibiting ordinarily protected speech both out of regard for fellow students who

constitute a captive audience and in recognition of the fact that the school has a substantial educational interest in avoiding the impression that it has authorized a specific expression." Id., at 1049. (emphasis supplied).

In the case at bar, the students' free speech rights are not only limited but they are also not directly implicated. No student has been refused permission to speak; no student has been denied the right to engage in "symbolic speech" as was the case in Tinker, supra. Here, the School Board has merely exercised its statutory duty in a reasonable manner to remove certain books from the school library.

Pursuant to New York Education Law Section 1709 and Section 701(1), the School Board was given the power and duty to (1) set the course of study, (2) select the textbooks to be used, (3)

take charge and possession of the books, and (4) manage and control the schools. As has long been recognized, a school board has broad powers over the schools in its care.

> "By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."
> Epperson v. Arkansas, 393 U.S. 97, 104 (1968). (emphasis supplied).

In the instant suit, the record is clear that the School Board removed all but one of the books from the school library because they "contained indecent matter, vulgarities, profanities, explicit sexual descriptions or allusions, sexual perversion, or disparaging remarks about Blacks, Jews, or Christ." (The book which did not contain vulgar or indecent language was A Reader for Writers, edited by Jerome

W. Archer and Joseph Schwartz. However, it did contain one story which the School Board believed to be in such bad taste as to warrant the book's removal.) See, eg., Pico v. Board of Education, Island Trees Union Free School District No. 26, 638 F.2d 404 (2nd Cir. 1980) (Mansfield, C.J. dissenting); and the Press Release of the School Board dated March 19, 1976 and found in toto in the district court's opinion in the instant matter, 474 F. Supp. 387 (E.D. N.Y. 1979). The Respondents contend that the Board's action was motivated by the political beliefs of the School Board members. The majority of the three judge panel of the Second Circuit also appear to hold this fear, that if the School Board in fact was motivated by political beliefs, their action in removing the books somehow rose to the level of a constitutional violation. Yet, the Tenth and Seventh Circuits have

held that "it is in general permissible and appropriate for local boards to make educational decisions based upon their personal social, political and moral views." Cary v. Board of Education, 598 F.2d 535, 544 (10th Cir. 1979); Zykan v. Warsaw Community School Corporation, 631 F.2d 1300, 1305 (7th Cir. 1980).

Even in the Second Circuit, the prior case law has not turned upon whether the removal of books containing obscene language and explicit sexual descriptions was motivated by political concerns. Presidents Council District 25 v. Community School Board No. 25, 457 F.2d 289, cert. denied 409 U.S. 998 (1972). There, the Second Circuit found that classroom discussion of the removed book and of the ideas contained in the removed book was not restricted. Also, alternate sources of obtaining the book, such as a public library, were available. Thus, the Second Circuit

concluded that "the intrusion of the Board here upon any first amendment constitutional right of any category of plaintiffs is not only not 'sharp' or 'direct' it is miniscule." Id., at 292. The requirement that basic constitutional values must be "sharply and directly implicated" before a court will intervene in a school controversy is taken from this Court's decision in Epperson, supra, at 104.

Here, classroom discussion is also unrestricted.

> "The record is undisputed that students and teachers remain free to discuss the ideas in the books, free of the indecencies and vulgarities. Plaintiffs' own statement (submitted under Local Rule 9(g)) of 'facts about which no material dispute exists' states that, although the removed books may not be assigned for reading, 'defendants have not precluded discussion about the themes of the books or the books themselves.' Defendants confirmed this in their similar statement, advising that 'no teacher has been instructed not to discuss the

> books which were removed or to refrain from discussion or comment upon the ideas and positions they represent.'" Pico v. Board of Education, Island Trees Union Free School District No.26, on denial of petition for rehearing in banc, (Mansfield, C.J. dissenting). (Slip Opinion at p. 6866). (footnote omitted).

Here, there are also alternative sources for obtaining the removed books, such as a public library or a bookstore. Thus, the determinative facts of the case at hand appear to be in accord with the Second Circuit's decision in Presidents Council, supra. See also Bicknell v. Vergennes Union High School Board of Directors, 638 F.2d 438 (2nd Cir. 1980).

Nevertheless, whether or not the School Board was in fact motivated by its members' political beliefs is not the dispositive issue. The dispositive issue concerns the power of the School

Board to select textbooks, set the curriculum, and in general, manage and control the schools, including the school libraries, especially where the books removed contain obscenities, vulgarities, and religious and ethnic slurs and particularly where, as here, there has been no suppression of views. To engage in speculation about possible political motivations in the removal of certain books containing indecent material is to exhalt form over substance. Where there are undisputed facts to support the School Board's action as reasonable and rational, ie. that a reading of the books reveals the obscenities and vulgarities complained about, the courts should not indulge in speculation as to possible political motivations. Therefore, the Second Circuit should have upheld the actions of the Island Trees Board as it did the

actions of the Vergennes, Vermont, Board in Bicknell, supra.

When balancing the School Board's right and duty to choose the books used in educating children against the students' limited First Amendment rights, the School Board's right in the instant case must take precedence. Several factors account for this. First of course is the School Board's broad power to manage and control its schools. Epperson, supra. As a long line of cases suggests, a School Board has the authority to remove books and set the curriculum where its actions were not for the purpose of promoting a certain religion nor for the purpose of suppressing a particular point of view. See, eg., Epperson, supra, Carey, supra, Zykan, supra.

Another factor is the state's great interest in the protection of its young. Here, the subject is not a college

library or a public library but the libraries of junior high and high school students. In upholding New York's "harmful to minors" statute which made the sale of sexually explicit, but not legally obscene, materials to minors illegal, this Court stated "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.'" Ginsberg v. New York, 390 U.S. 629, 638 (1968) (citation omitted). To hold that the pictorial depiction of sexually explicit material could not be sold to minors but that the vulgar description of the same activities must be kept in a public school library would be anomalous at the very least.

Following that reasoning raises the issue of whether a book acquires some sort of tenure merely by its presence on the shelf. Although the Sixth Circuit

has so held, Minarcini v. Strongsville City School District, 541 F.2d 577 (6th Cir. 1976), amici strongly urges that such a position be rejected by this Honorable Court. The Second Circuit specifically rejected the book tenure argument in Presidents Council, supra, at 293, by stating "books which become obsolete or irrelevant or were improperly selected initially, for whatever reason, can be removed by the same authority which was empowered to make the selection in the first place." (emphasis supplied). If a book could acquire tenure, the results could be quite disturbing. If, for example, an elementary school library wished to order a book on the Muppets and through a typographical error, the book ordered, delivered, and shelved was the hard core child pornography magazine Moppets, would the magazine acquire tenure and would the School Board be required to

keep it in the elementary school library?

Another factor accounting for the School Board's right taking precedence over the limited rights of the students is that the ideas in the books were not restricted or supressed but rather the indecent words used to express those ideas. In other words, the School Board's action was not a suppression of the content of speech; it was merely a restriction on the form the speech took. See Part IV-A of the plurality opinion in F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978), for a similar analysis. Again, the students and teachers remained free to discuss the ideas in the removed books and even to discuss the books themselves. Thus, the thoughts contained in the books, even the political ideas which perhaps were unpopular with the majority of the adults residing in the instant school

district, could be expressed and discussed without resort to obscene language. In addition, this Court's decision in Pacifica Foundation, supra, rested in part upon the government's legitimate interest in protecting its young from indecent material. Pacifica Foundation at 749-750, citing Ginsberg, supra.

As discussed supra, the students' First Amendment rights have not been directly implicated in the case at bar. However, the case of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) has created a First Amendment right to receive protected speech in certain circumstances. There, the right to receive advertising information on the prices of prescription drugs was upheld. Such a holding can not be stretched to encompass the instant matter. The school environment is a

vastly different arena for the expression of speech than is the general arena of the "marketplace of ideas." Even assuming arguendo that the students have some nebulous right to receive under the First Amendment, the state via the School Board has no duty to provide it. See Harris v. McRae, 448 U.S. 297, 315 (1980) (The Hyde Amendment which limits Medicaid funding for certain abortions was upheld as not violative of due process because it "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy."); and Ginsberg, supra, at 636-638 (Minors have no right to receive sexually explicit "harmful" but not legally obscene material.).

Therefore in balancing all of the factors involved, the School Board's right to manage and control the schools, which includes the supervision of the school libraries, clearly outweighs the

limited First Amendment rights of the students.

Proposition of Law No. 2

JUNIOR HIGH AND HIGH SCHOOL STUDENTS IN A PUBLIC SCHOOL SYSTEM DO NOT HAVE A SUFFICIENT FIRST AMENDMENT INTEREST IN ORDER TO BE ENTITLED TO PROCEDURAL DUE PROCESS ON THE ISSUE OF THE RETENTION OR REMOVAL OF SCHOOL LIBRARY BOOKS.

The requirements of procedural due process apply only to deprivation of interests encompassed within the Fourteenth Amendment's protection of liberty and property. Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972). One of the many "liberty" rights encompassed within the Fourteenth Amendment includes the freedom of expression. Gitlow v. New York, 268 U.S. 652 (1952).

However, the students in the case at bar have only limited First Amendment rights under the facts. Respondents did not have a "liberty" interest sufficient

to require the School Board to grant them a hearing when the decision to remove the books was made. Therefore, any "liberty" deprivation suffered by the students was only "de minimis" and unprotected.

The deprivation was "de minimis" because of the nature of the students' limited interest and the fact that their free speech rights were not directly implicated. As this Court has said in a different context, "It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains free as before to seek another." Roth, supra, at 567. The Respondents herein remain free, as before, to seek the removed books from a public library or to purchase them from a bookstore. In addition, the students have not been restricted in their discussions of the

ideas in the removed books or the books themselves.

". . .[I]n determining whether due process requirements apply in the first place we must look not to the 'weight' but to the nature of the interest at stake." Goss v. Lopez, 419 U.S. 565, 569 (1975), citing Roth, supra, at 570-571. (emphasis supplied). An examination of the "nature of the interest at stake" clearly demonstrates that the students were not entitled to procedural due process protection in the instant case.

Even though the students had no right to demand it, the School Board complied with procedural due process as a perusal of the facts as given in the district court's opinion reveals. Pico, supra, 474 F. Supp. at 387 et. seq. The School Board even established an independent committee to assist them in their decision. That the Board did not

follow all of the recommendations of the committee is immaterial because they were under no duty to provide for a committee review and they were under no mandate (nor could they have been) to accept the recommendations of any committee.

Therefore, as the district court's opinion and the dissenting opinion of Circuit Judge Mansfield make clear, the procedure adopted by the School Board in the case at bar was reasonable, rational, and adequate to protect the limited First Amendment rights of the students. The procedure followed certainly was ". . . appropriate to the nature of the case." Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950).

CONCLUSION

For the reasons stated herein, the decision of the United States Court of Appeals for the Second Circuit should be

reversed and remanded with directions to affirm the decision of the United States District Court for the Eastern District of New York.

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Three copies of the within Brief for Amici Curiae Charles H Keating, Jr. and Citizens For Decency through Law, Inc., in Support of the Petitioners were sent by U.S. Mail, Postage Prepaid, on this 27th day of November, 1981 to:

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Office - Supreme Court, U.S.
FILED
NOV 27 1981
ALEXANDER L. STEVAS
CLERK

NO. 80-2043

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT, ET AL., PETITIONERS
V.
STEVEN A. PICO, BY HIS NEXT FRIEND FRANCES PICO, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

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THE LEGAL FOUNDATION OF AMERICA

CONSENT OF PARTIES

All parties have consented to the filing of this brief of Amicus Curiae. Initially, consent was received orally from George W. Lipp as counsel for Petitioner and from Arthur Eisenberg as attorney for Respondent, on November 20, 1981. Both such counsel agreed at that time to grant written consent, to be

mailed to this Amicus Curiae. Such written consents are being lodged with the Court herewith (or will be so lodged as soon as received).

INTEREST OF AMICUS CURIAE

The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm. Its goals, among others, include protection of economic freedom, removal of unreasonable regulation, attainment of a fair balance between the national government and the States, and preservation of a rational system of criminal justice. In conjunction with its interest in the federal-state balance, LFA has frequently undertaken to oppose undue federal intervention in local schools. LFA has also litigated to prevent the freedom of expression from

being burdened by unnecessary and unreasonable regulation.

LFA believes that the decision of the Court of Appeals in this case misses the point. The decision fails to give effect to first amendment interest of school board members, voters, citizens petitioning the school board for redress of grievances, parents, and school children generally. The Court of Appeals in fact violated the freedom of expression of many in order to grant privileges of illusory value to a few.

STATEMENT OF THE CASE

Frances Pico, next friend of the minor child Steven A. Pico, wished Steven to be able to read certain books that happened to contain graphic depiction of torture murder, anthropophagy, sex acts with animals, multiple four-letter descriptions of sexual and excretory acts,

and other material the suitability of which for minors some parents might doubt. This case presents no issue of Ms. Pico's right to allow Steven to read these materials, nor does it involve disability on her part to do so, since she could obtain them from any one of numerous libraries and bookstores. Instead, the case is an attempt to make such materials freely available in public schools to all schoolchildren, including those whose parents disagree with Ms. Pico. Specifically, it involves a suit filed by Frances Pico and other individuals to force the rest of the community in which she lives to continue to provide such books to all schoolchildren at taxpayers' expense in public school libraries.

A citizens' group named People of New York United ("PONYU") opposed this approach. Exercising the first amendment right of petition, PONYU advocated discontinuation of government sponsorship of the material at issue at taxpayer's expense in the school library. The members of the school board appointed a committee which studied each of the materials in question. Exercising independent judgment, the board determined that some of the materials in question should remain available at community expense to school children despite sensitive contents (though it caused at least one of the books to be placed on restricted shelving). This action had no effect upon the rights or practical abilities of willing adults to obtain the materials in question. It also had no effect on the

ability of adults to sell or lend such books to minors, or the ability of minors to borrow or purchase them from places other than school libraries. Indeed, it did not prevent teachers from using the books in discussion.

Nevertheless, this action led to Mrs. Pico's suit. The district court granted summary judgment for the school board. The Court of Appeals, however, reversed and remanded the case for trial. Three separate opinions make the basis of decision difficult to characterize, but it appears to be based upon the notion that the school board's motivation was improperly "political" since its attention was directed to the problem by a citizens' group and since it considered the content of the materials.

SUMMARY OF ARGUMENT

I.

The action of the Court of Appeals itself violates the first amendment. It forces members of the school board, and members of the community who can speak only through the school board, to sponsor materials as appropriate for schoolchildren when otherwise they would not do so. It results in a judicial preference for shock writing over other kinds of expression. It inhibits experimentation with new and controversial educational materials or curricula, since it means that such materials will be difficult to remove even if they fail to accomplish educational purposes. And it proceeds on the strange assumption that the "symbolic" disapproval implied by the board's action is unconstitutional, even though

this assumption involves prohibiting symbolic action by the board precisely because it is speech.

The Court of Appeals' opinion likewise violates the first amendment rights of citizens to petition their government for a redress of grievances, since it is based in part upon the initiation of consideration of the problem by a citizens' group. Finally, the Court of Appeals' view of the "indoctrinative" function of education violates the right of parents to determine the manner in which the moral compass of society will be transmitted to their children.

II.

The Board's action does not hinder anyone's exercise of free expression. The existence of a constitutional right does not mean that government must sponsor its exercise in any particular manner

at taxpayer's expense. Furthermore, the Court of Appeals' references to "banning" or "condemning" books simply have no relation to this case.

III.

The Court of Appeals' decision forces an unwilling district court to sit as a super school board, with detrimental effects upon both schools and courts.

ARGUMENT AND AUTHORITIES

I. THOUGH PURPORTING TO PROTECT THE FREEDOM OF EXPRESSION, THE DECISION OF THE COURT OF APPEALS IN FACT VIOLATES THAT FREEDOM.

A. The Decision Forces Endorsement of Expression Upon the School Board Members.

(1) Plaintiff's sole desire in this case is for a judicially forced symbolic act of approval from the school boards despite its members' unwillingness.

This case has arisen because Plaintiffs wish the members of the school,

as representatives of the community, to be judicially forced to make an implied statement of endorsement of the books in question as suitable reading material for minors. There can be no question that such an inference would result from inclusion of the books in a public school library. Indeed, so strong is the implication of approval that at least two federal courts have examined the contents of a school's library in determining its educational policy. Parducci v. Rutland, 316 F. Supp. 352, 358 (M.D. Ala. 1970) (teacher's forcing of students to read offensive material justified by reference to fact that "the school library contains a number of books with controversial words and philosophies"); Mailloux v. Kiley, 323 F. Supp. 1387 (D. Mass. 1970), aff'd 448 F.2d 1242 (1st Cir. 1971) (be-

cause particular four-letter word was in books in the school library, teacher could use it in the classroom).

Additionally, the decisions in this area are full of statements to the effect that school boards have the authority to select appropriate educational materials to transmit the values of the society. E.g., Zykan v. Warsaw Community School Corporation, 631 F.2d 1300, 1305 (7th Cir. 1980); Cary v. Board of Education, 598 F.2d 535, 543 (10th Cir. 1979). Given this charge, it is natural for parents and schoolchildren to assume that materials so selected do reflect these values, and to force the school board to endorse materials that insult these values infringes upon its members' own freedom of expression.

(2) The Court of Appeals' opinion forces subsidy of certain kinds of expression at the expense of others.

To shelve, store, catalog, and maintain a book in a library requires the expenditure of limited resources. Use of these funds to store one book necessarily prevents the library from spending funds on another purpose. It is entirely possible that, instead of spending money to maintain, trace, catalog and shelve works by Vonnegut or Cleaver, the school district might have chosen to do the same with books on defensive football tactics, medieval English history or knitting. The Court of Appeals' decision not only prevents this choice, but requires the school board, involuntarily, to fund retention of the books in question in perpetuity. The logical extension of this reasoning is to require the school board, in perpetuity, to continue periodical subscriptions, even at enormous

expense. Indeed, such a result was reached in Salvail v. The Nashua Board of Education, 469 F. Supp. 1269 (D.N.H. 1979) in which the court literally and expressly required the school board to undertake "replacement and resubscription [of the magazine, MS.] to be made, if necessary, by purchase out of the first funds available for library purposes" (emphasis added), even though the school board had concluded that the explicit advice concerning sexual intercourse techniques contained in the publication at issue rendered it educationally unsuitable, and even though the court's decision obviously prevented valid use of the funds for other expression. The Nashua Board of Education was then forced to continue to buy MS. Magazine indefinitely -- instead of The National Geographic, or The New Republic, or other kinds of

expression. The Court of Appeals' opinion in this case compels the same result.

(3) The Court of Appeals' opinion requires an anomalous preference of certain expression precisely because it is less educationally appropriate.

Logical extension of this reasoning leads to the conclusion that the school board is required to give an anomalous kind of judicially ordered preference to certain kinds of expression over others. Removal of innocuous material is permissible, but discontinuation of expression favoring sadism, promiscuity, racial prejudice, religious persecution, bestiality, and other distasteful material is illegal. Discontinuation of offensive material is likely to be done on the basis of its content, and it may even be done at the "political" initiation of irate parents or citizens' groups, a

process which the Court of Appeals would consider unlawful. If applied literally, the principle that educationally appropriate material can be lawfully removed, but that offensive and inappropriate material cannot be, would result in school libraries containing only books that disgust and shock. Such an approach is not only logically indefensible, but violative of the right of the school board and the community that speaks through its members to avoid expressing approval of material of which they in fact disapprove.

(4) The "wrong" of which the school board stands accused here is, ironically, that of symbolic expression protected under the first amendment.

Judge Newman, who cast the deciding vote below, decided the case not on the basis that there had been any restraint

or censorship of speech, but rather on the ground that the school board members had themselves engaged in protected freedom of expression of which Judge Newman disapproved. Specifically, Judge Newman's opinion reads as follows, in pertinent part:

> The symbolic effect of a school's action in removing a book solely because of its ideas will often be more significant than the resulting limitation upon access to it. The fact that the book borrowed from the school library may be available elsewhere is not decisive. What is significant is that the school has used its public power to perform an act clearly indicating that the views represented by the forbidden book are unacceptable. The impact of burning a book does not depend on whether every copy is on the fire. Removing a book from a school library is a less offensive act, but it can also pose a substantial threat of suppression.

638 F.2d at 434. Judge Newman's reasoning -- that it is not the availability of the book that is at issue, but rather the need to suppress the views of the school board's members -- could not be more clear. His comments could be equally applied to a school board member's public speech advising against the reading of Slaughterhouse Five or Soul on Ice. Likewise, under Judge Newman's view, the posting in the school library of a school newspaper excerpt containing a negative review of the book would be illegal. Prohibiting a school board's action because of its symbolic effect is as unconstitutional as prohibiting explicit utterances, because symbolic speech is protected under the Constitution. Tinker v. Des Moines Independent School Dist.,

393 U.S. 503 (1969).* Furthermore, the right extends even to school boards and to those in the community who can only speak through school boards.

B. The Court of Appeals' Decision Discourages Experimentation With Controversial New Curricula or Materials, Because Such Materials Cannot Easily be Removed Later Even if They Prove Educationally Inappropriate.

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* The Court of Appeals inappropriately cited Tinker in support of its result, and it may be expected that Plaintiffs may do the same in this Court. Tinker is inappropriate as authority because Plaintiffs here, unlike those in Tinker, do not seek to engage in symbolic expression. Instead, they seek to force others (the school board, its members, and the majority of the community) to engage in the symbolic act of subsidizing certain books and thus signify approval of Plaintiffs' views. For a discussion of the inappropriateness of Tinker's "disruption" reasoning in this context, see Goldstein, The Asserted Constitutional Right of Public School Teachers to Determine What They Teach, 124 U. Pa. L. Rev. 1293, 1322-23 (1976).

One of the most ironic results of the Court of Appeals' opinion will be its inhibition of anything but staid, orthodox views. The opinion makes experimentation extremely risky. The addition of a controversial textbook, subject matter, curriculum, or teaching method will insure the difficulty of its removal, because if it has any adherents at all, they will challenge its removal as "political" precisely because of its controversial nature. Indeed, any school board attorney worth his salt will so warn his clients.

Lest this line of reasoning be considered illogical, it should be pointed out that at least two federal courts have followed it. For example, in Right to Read Defense Committee v. School Committee, 454 F. Supp. 703, 712 (D. Mass. 1978),

the school board removed a book called Male & Female because of its conclusion that it was "filthy," "obscene," and "disgusting." The court acknowledged the right of a school committee to determine what books will go into a library. The court further pointed out that the committee was under no obligation to purchase Male & Female for the high school library. But, the court concluded, "it is a familiar constitutional principle that a state, through having acted though not compelled, may consequentially create a constitutionally protected interest." Thus, having experimented with a controversial matter, the school committee was "locked" into keeping it and had no discretion to change. Accord, Minarcini v. Strongsville City School District, 541 F.2d 577 (6th Cir. 1976) ("once having created such a

privilege for the benefit of its students, however, neither body could place conditions on the use of the library . . .").

Such reasoning unconstitutionally penalizes exercise of the right to experiment with new and controversial ideas and to undertake change if the experiment does not succeed.

C. The Court of Appeals' Decision Penalizes Citizens' Groups for Exercising the First Amendment Right to Petition Their School Board for a Redress of Grievances.

The opinion of the Court of Appeals turns in large measure upon the fact that consideration of the books at issue was initiated by a citizens' group. The court purportedly found of constitutional significance the fact that the handbills produced by this citizens' group were "crudely typed", and it quoted at length from the views of the citizens' group.

The court even found it necessary to critique the editorial style of the handbills, indicated that they left "no great sense of confidence in the literal accuracy of the quotations" contained in them, although the excerpts quoted by the dissenting judge show that, to the contrary, the handbills were accurate.

The petition of this citizen's group for a redress of grievances led to the appointing of a committee, which, in turn, led to board consideration of the books at issue. The opinion of the court, in a departure from the first amendment that could not be clearer, expressly disapproves such citizen input, labelling it perjoratively as "political." The court argues that the case does not involve "routine" actions of school officials alone. "What we have instead

is an unusual and irregular intervention in the school library's operations by persons not routinely concerned with such matters [i.e., by American citizens]." Further, in the strange view of the opinion of the court, citizen input, "far from clarifying the scope and intentions behind the official action, create[s] instead grave questions concerning both subjects." 638 F.2d at 414. This is extraordinary reasoning for a court in the United States to engage in. Stripped of its rhetoric, the Court's opinion amounts to nothing more nor less than disapproval of the input of American citizens into the process by which they are governed.

The first amendment goes beyond protecting the "freedom of speech." It also expresses specific protection for

the right of citizens to "petition" the government "for a redress of grievances." If that right means anything, it must mean that the decision of a public body is not invalid merely because it is the ultimate result of citizen initiation. The Court of Appeals' decision penalizes citizens for exercising this right.

The first amendment right of petition exists with reference to the content of school instruction and educational materials. Thus, in Williams v. Board of Education, 388 F. Supp. 93 (S.D. W.Va. 1975), aff'd, 530 F.2d 972 (4th Cir. 1975), plaintiffs were parents of school-children who sued to restrain a school board from allowing use of textbooks they considered offensive to their moral concepts and to their "personal . . . and familial privacy." The court denied relief and concluded,

> In the absence of basis for relief in the courts, where no violation of constitutional rights is found, plaintiffs and parties similarly situated, with references to books and materials found offensive to and objectionable by them, may find administrative remedies through board of education proceedings or ultimately at the polls on election day.

388 F. Supp. at 96. The right of petition recognized in that case should be available to the citizens' group in this case.

D. The Majority's Reasoning About the "Indoctrinative" Function of Education Violates the Rights of Parents to Decide How Moral Values Will be Taught to Their Children.

Virtually all of the cases dealing with book and curricular selection indicate that transmittal of moral values of the community is a major function of education, particularly at the elementary and secondary levels. The Court of Appeals recognized this principle, expressly stating:

> A principal function of all elementary and secondary education is indoctrinative--whether it be to teach the ABCs or multiplication tables or to transmit the basic values of the community.

638 F.2d at 412.

The court, however, did not in this case allow the school board to pursue rational policies for this "primary" function. Such policies must be exercised in the light of the content of the material and in light of community views and standards, but these are considerations the court considered impermissibly "political." The court's reasoning contrasts sharply with the reasoning of another Court that

> a teacher does not have a right, constitutional or otherwise to teach what he sees fit or to overrule the parents' decision as to which courses their children will take.

Mercer v. Michigan State Board of Education, 379 F. Supp. 580, 586 (E.D. Mich. 1974), aff'd, 419 U.S. 1081 (1974).

The content of material, even if it is not obscene or vulgar, may have educational significance in this function. Allegorical material, for example, while appropriate for communication to sophisticated students, may not be appropriate for children, because children tend to take it literally. See, e.g., J. Piaget, The Language and Thought of the Child (1924); J. Piaget, The Moral Judgment of the Child (1932); R. Brown, Social Psychology Ch. 8 (1965). Some of the material at issue in this case contains neutral descriptions of deplorable, even terrifying, behavior. It contains literal advocacy of the worst kind of prejudices and exploitative acts. Some of it is satirical, intended to disapprove the very conduct it seems to condone (e.g., Swift's Modest Proposal). For adults,

such material can be worthwhile because of its literary merit or even its view illustrating moral complexities. In a child, however, it may inspire imitative behavior. Children learn much of their moral judgment by assimilation and modeling of stories. R. Brown, supra, at 394-401. Parents residing in the Island Tree Union Free School District were entitled so to conclude, and they were further entitled, through their elected representatives, to express that conclusion.

Children in public schools, and their parents as well, constitute a captive audience. Plaintiffs in this case wish to use judicially coerced symbolic approval of the materials they consider educationally appropriate for moral purposes to inflict them upon this

captive audience. Plaintiffs could, if they wish, express their moral theories by provision of these materials from other sources to their children; their reason for not doing so is the desire to force the school board to do so as to children whose parents are unwilling. Such parents, unlike the plaintiffs, have no ability to express their views on the subject, other than through the action of the school board, since they cannot be with their children from moment to moment throughout the school day to supervise them. The solution chosen by plaintiffs to make the books in question available at taxpayer expense to all children, even over the objections of the majority of parents expressed through the school board, provides plaintiffs no additional rights and ignores the interests of

parents who disagree. See Goldstein, The Asserted Constitutional Right of Public School Teachers to Determine What They Teach, 124 U. Pa. L.Rev. 1293, 1340 (1976). The result is an invasion of the associational privacy of the family, a denial of parental right to influence the moral growth of children, and an infringement even of the right to speak through one's elected representatives.

II. THE SCHOOL BOARD'S ACTION DOES NOT HINDER ANYBODY'S FREEDOM OF EXPRESSION.

A. The Existence of a Constitutional Right Does Not Mean the Government Must Sponsor Its Exercise at Taxpayer's Expense.

What Plaintiffs in this case seek through their lawsuit is an order directing the government to financially sponsor their idiosyncratic desires with respect to curriculum and reading material. The

existence of a constitutional right has never meant that there is a concomitant constitutional compulsion for the government, at whatever level, to subsidize the exercise of that right. For example, this Court in Roe v. Wade, 410 U.S. 113 (1973), held that there is a constitutional right to obtain an abortion during the first trimester. Such a determination, however, did not translate into a governmental responsibility to finance the exercise of that right.

Even in those areas in which the protection of freedom of speech is of paramount concern, such as in campaigns for elective office or similar political speech, the existence of the constitutional right does not create a concomitant right to have that speech financed. Anyone has the right in the political

arena to support any candidate or to support any cause, but the government is not required to supply financial sponsorship for those activities. In fact, no logical or practical limitations could be applied if the government must financially sponsor the exercise of the right of free speech. Since the right extends to each individual, presumably the government would be required to adequately finance each individual to exercise fully his or her rights. See Goldstein, The Asserted Constitutional Right of Public School Teachers to Determine What They Teach, 124 U. Pa. L.Rev. 1293, 1340 (1976). If the Picos and their supporters are entitled to retain or place the books they desire in the school library, that right also accrues to all others in the school

community. This result would be irrational and catastrophic for the school district.

The Court of Appeals objected to the "political" nature of the determination by the school board. But the board's decision required quasi-legislative balancing of limited resources. The board, being the duly elected body designated by the taxpayers to manage the schools for which they contribute their tax dollars, is the only logical and viable group to be responsible for decisions of this kind. In fact, to carry the Plaintiffs' request to its logical conclusion would require some level of government to purchase or retain for each citizen any book he or she desires to read even though the funds are not available or the book, though purchased, cannot economically be maintained.

B. Discontinuation of Government Sponsorship of Materials that Are Inferior for Educational Purposes Does Not Amount to "Banning" or "Condemning" Expression, Nor Does It Violate the First Amendment.

The first amendment simply states that no law shall be made "abridging the freedom of speech, or of the press." The Court of Appeals' opinion does not offer an explanation of any way in which the school board abridged any speech. The court talks about the "burning" of books, although the reference is preposterous since the case does not remotely involve any such thing. It also talks about the "condemning" of books as educationally inappropriate. In essence, though the Court disclaims any such notion, its opinion means that any identification of materials that may not be appropriate for use by students is an abridgement of

speech. The logical conclusion one draws from its decision is that any time the board makes a decision concerning curriculum based upon the desires, input or moral values of the community, it has engaged in a "political" decision and has abridged the first amendment.

The fact that the school district determined that certain works would not be included in its curriculum or in the school library has in no way limited the availability of those works to the Plaintiffs. Plaintiffs are perfectly free to obtain and read those books from the local public library or from a local bookstore. The argument cannot be made that the books must be placed in the school library to make them available to the Plaintiffs. Frances Pico does not and cannot claim that she is unable to

get any one of these books, free, from any of a variety of sources. Indeed, Steven Pico, though a minor, can also do so. Plaintiffs do not seek any such right; instead, their desire is to inflict their views on others.

III. THE COURT OF APPEALS' DECISION FORCES AN UNWILLING DISTRICT COURT TO SIT AS A SUPER SCHOOL BOARD WITH DETRIMENTAL EFFECTS FOR BOTH SCHOOLS AND COURTS.

If the Plaintiffs are successful in this case, the result will be to place District Courts across the nation in the position of serving as super school boards, monitoring all curricular decisions to ensure the absence of any citizen input or "political" motive. The Court of Appeals disclaims any intent to limit the use of community standards and tastes

for the determination of curricular and other educational decisions. However, the Court also indicates that it will require school boards to follow an "objective" set of criteria for school library decisions. 638 F. 2d at 418, n.13. It is difficult to imagine how a school board can establish "objective" criteria to implement personal tastes and community standards, which are by their very nature subjective. It is even more difficult to imagine court review of decisions so made. It is precisely these decisions which should be left to the duly elected body, the school board.

In its advocacy of "objective" criteria, the court confused curricular decisions with disciplinary cases. It may be necessary to have objective criteria to fire a teacher or suspend a

student, because such decisions are made in reaction to individuals' conduct or speech. No such problem arises with the selection of a library book. The Court's confusion led it to an erroneous result. 638 F.2d at 418 n.13.

As the involvement of the courts, and that of lawyers, becomes more prevalent in the schools, board decisions are increasingly made by lawyers. When legal issues are inserted into school board matters, the board will be reluctant to disagree with the recommendation made by its lawyers. The result will be that what traditionally are and should be policy decisions will become legal decisions. Lawyers are not, however, educators and are simply not suited to make educational policy decisions.

Furthermore, the invocation of legal and other extraneous controls on the schools has the result of decreasing public support for those institutions. The traditional strength of schools in this country has been through the support of the local community. The Court of Appeals decision, however, places one more restraint on the ability of the local community to control its schools through the available political process.

Justice Powell expressed these ideas in Columbus Board of Education v. Penick, 443 U.S. 449 (1980) and in Dayton Board of Education v. Brinkman, 443 U.S. 526 (1980) (dissenting opinion), as follows:

> The orders affirmed today typify intrusions on local and professional authorities that affect adversely the quality of education. . . . This wholesale subsitution of judicial legislation for the judgments of elected officials and professional

> educators . . . constitutes a serious interference with the private decisions of parents as to how their children will be educated . . . .
>
> These harmful consequences, moreover, in all likelihood will provoke responses that will defeat the . . . purpose of the court's order. Parents, unlike school officials, are not bound by these decrees and may frustrate them through the simple expedient of withdrawing their children from a public school system in which they have lost confidence.
>
> . . . It would be unfair and misleading to attribute this phenomenon to a racist response to integration per se. It is at least as likely that the exodus is in substantial part a natural reaction to the displacement of professional and local control that occurs when courts go into the business of restructuring and operating schol systems. 99 S.Ct. at 2990.

Or, as the Court of Appeals has said in another case,

> Academic freedom is scarcely fostered by the intrusion of three or even nine federal jurists making curriculum or library choices for the community of scholars.

President's Council, Dist. 25 v. Community School Board, 457 F.2d 289, 292 (2d Cir. 1972), cert. denied, 409 U.S. 998 (1972).

Over the past two decades there has been an explosion of cases in which the federal judiciary has become involved in the operations of the public schools. Federal judges have decided issues regarding the length of students' hair and who can play football. Discipline of unruly students and termination of incompetent teachers have been made impractically difficult in many instances by judicial decisions, without even mentioning draconian desegregation remedies. While these decisions represent an unwarranted degree of intrusion on the local control of schools, the Court of Appeals' decision controls the very essence of a school board's mission: the determination of

educational policy. Such decisions should be made instead by the community whose children are being taught.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David Crump, hereby certify that I have served three copies hereof upon each counsel of record in this cause, by mailing same, first-class postage prepaid, to each such counsel at his post office address, namely, George W. Lipp and Arthur Eisenberg, on this _____ day of _____, 1981.

_____
David Crump

No. 80-2043

Office-Supreme Court, U.S.
FILED
DEC 30 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26, RICHARD AHRENS, FRANK MARTIN, CHRISTINA FASULO, PATRICK HUGHES, RICHARD MELCHERS, RICHARD MICHAELS, AND LOUIS NESSIM,

Petitioners,

v.

STEVEN A. PICO, by his next friend, FRANCES PICO, JACQUELINE GOLD, by her next friend, RONA GOLD, RUSSELL RIEGER, by his next friend, SAMUEL RIEGER, GLENN YARRIS, by his next friend, RICHARD YARRIS and PAUL SOCHINSKI, by his next friend, HENRY SOCHINSKI,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* THE LONG ISLAND LIBRARY ASSOCIATION COALITION IN SUPPORT OF RESPONDENTS

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Interest of *Amicus Curiae*

This is a case about *libraries*—not about classrooms.

This is a case about *library books*—not about textbooks.

This is a case about *librarians*—and their role in the selection and maintenance of library materials.

* * *

The complaint in this case alleges that the actions of the school board members imposed arbitrary and unreasonable restrictions upon the ability of librarians to function properly (J.A. -5).* Regrettably, that allegation, and the significant distinction between required curriculum, instruction and textbooks on the one hand, and voluntary access to collections of library materials on the other, have not received the attention they merit.

Although one of the nine banned books had earlier been approved by the school board for use in a senior literature course, all of the others were simple library books not used in the curriculum. The issue before this Court does not concern a question of classroom instruction but rather a question of access to books on school library shelves.

The parties seem to agree that materials in public libraries are immune from arbitrary censorship by state instrumentalities. One of the major unresolved questions presented by this case, therefore, is the status and function of the school library and the role of the professional librarian in decisions about collection maintenance.

The Long Island Library Association Coalition (the "Coalition") is composed of six groups of professional librarians covering the full range of libraries and disciplines in the Island Trees geographical area:

1. *The Nassau County Library Association,* whose membership includes 800 professional and clerical staff and trustees in academic, special and public libraries.

2. *The Suffolk County Library Association,* with a membership of over 400 members in the same categories.

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* References to the Joint Appendix will be cited as "J.A.—"; references to the opinion below, *Pico* v. *Board of Education, Island Trees Union Free School District No. 26,* 638 F.2d 404 (2d Cir. 1980), *cert. granted,* 50 U.S.L.W. 3265 (U.S. Oct. 13, 1981), will be cited as "Op.—."

3. *The Long Island School Media Association,* with a membership of 175 professional school media specialists (school librarians).*

4. *The Special Libraries Association,* composed of 90 librarians in business and technical libraries.

5. *The Children's Librarians Association of Suffolk County, Inc.,* with a membership of 70 children's library specialists.

6. *Medical and Scientific Libraries of Long Island,* comprising 100 librarians employed by institutional libraries.

The 1600-plus members of the Coalition believe that it is the function and responsibility of professional librarians to implement on the operational level the general policy mandates of their respective institutional governing bodies. The governing bodies set overall objectives, budget and guidelines, while the professional staff puts them into effect on a day-to-day basis.

At stake in this litigation is the continued vitality of the total educational experience upon which we depend to produce citizens capable of functioning in, and contributing to, a democratic society.

The librarians in the Coalition are professionally trained to make judgments on the quality and suitability of library materials and are deeply disturbed by the trend of censorship in school libraries which this case and the movement that triggered it represent. They believe that the Constitution places limits on the power of any public body to deny young people access to information made available for their use through a rational, fair and reasonable process.

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* One of these members is Irene Turin, the professional librarian in charge of the Island Trees school library at the time of the events at issue in this case.

Libraries are repositories of knowledge which play a significant role in the development of a student's intellectual and critical faculties. There are, and there must be, constitutional limits on a school board's power to purge a school library of its books. If a school board, unhampered by the limits of the Constitution, may make sporadic forays into school libraries to eliminate ideas which do not comport with its vision of the world, a valuable resource will be lost to the detriment of all children, indeed of all citizens.

Statement

This case arises from the action of elected members of the Board of Education of Island Trees, New York, in ordering the removal of nine books from the shelves of the senior high school library, and a tenth book from the junior high school library. An eleventh book was also removed from the senior high school curriculum* (J.A. -46, -54). The removal was instigated by two members of the board who, with a third, had attended an educational conference sponsored by a conservative organization in Watkins Glen, New York, in September, 1975 (J.A. -21, -22). There, one of them had obtained a list of books described as "anti-American, anti-Christian, anti-Semetic [sic], and just plain filthy" (J.A. -8). Subsequently, during an after-hours visit to one of the senior high school libraries when the professional library staff was absent, the two members checked the Watkins Glen list against the card catalog and found that nine of the offending books were catalogued and included in that library's collection. Precipitously, the board ordered the immediate removal of all books included in the

* Ultimately, the board permanently banned nine books, restored one to the restricted shelf and restored one book to the library shelves without restrictions (J.A. -75 through -79).

Watkins Glen list from the junior and senior high school libraries (J.A. -54). Its order was based solely on excerpts of the books included in the Watkins Glen list and on the reading of four of the books by one of the board members (J.A. -23). Ostensibly, the order was given to permit the members an opportunity to review them, but the board's directive forcibly stated that *"all copies"*—not simply examination copies—were to be removed and sequestered (J.A. -47) (emphasis in original). The board members then issued a press release describing the action they had taken and proclaiming themselves to be the "faithful Watchdogs" for "most" of the parents of the students (J.A. -10).

There was no claim by the board at the time the books were removed from the shelves that those books were wanting in literary merit or educational value. The sole basis given for their removal at the time was that the books presented a "moral danger" to students (J.A. -10).

A listing of the titles which were permanently banned by the school board from the school library appears in Appendix A, along with representative reviews from professional library journals and brief summaries of the literary credentials of their authors.

When the initial summary action was taken directing the physical removal of the books from the library shelves, the professional librarian in charge of the Island Trees school libraries, Irene Turin, went to the Superintendent of Schools, Richard Morrow, and questioned the board's action (J.A. -45). Mr. Morrow in turn objected to the board's banning of books based on the list obtained at Watkins Glen "unless we first study the books ourselves" (J.A. -44).

The Superintendent directed the attention of the board to the fact that it already had adopted a written policy "designed expressly to handle such problems." That policy,

he pointed out, called for the Superintendent, upon receiving an objection to a book or books, to appoint a study committee to make recommendations. The Superintendent urged that this written policy be followed (J.A. -44).*

The Superintendent specifically recommended to the board that a staff-parent committee be appointed to take under study the books on the list, "and that the staff members include Mrs. Turin, the District Chairman of Libraries; Mr. Brunnemer, High School Librarian; an English Department Head;" and one of two other named staff members (J.A. -46). He subsequently renewed the recommendation (J.A. -55).

The board disregarded the Superintendent's recommendations, as well as their own written policy providing for a due process review of the challenged books. This forced the Superintendent to take affirmative action on his own initiative. He issued a public statement protesting what the school board had done, and—for the third time—urged that a book review committee be appointed that would include "parents, teachers, librarians and administrators" (J.A. -56). He also urged that the books be returned to the library shelves until after the board had considered and acted upon the committee's recommendations (J.A. -57).

Their hands forced by the Superintendent's courageous appeal to public opinion,** the school board members finally approved the creation of a parent-teacher committee to review the challenged books. In direct contravention of the Superintendent's express recommendations, however, not a

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* The board later asserted—without referring to the text of the policy statement—that the written policy applied only to complaints by parents and not to complaints by the school board members (J.A. 25).

** The Superintendent has since been replaced.

single professional librarian was appointed to the committee. Although much was made in the court papers below about the "informed discussion and deliberation" among the committee members (J.A. -122), it is self-evident that there was no one present at those discussions to explain the professional judgments that went into the original selection of the books; or to review evaluations of the books in professional literature (*see* Appendix A); or to discuss the concept of balance and fairness which is essential to any adequate library collection (*see* the *Library Bill of Rights* and the *School Library Bill of Rights* set forth in Appendix B).

Voting by the book review committee was by closed ballot (J.A. -67), but there are reasonable inferences to be drawn from the 4-4 tie vote on several of the titles in a committee made up of four parents (selected by a school board which had already prejudged the issues) and four school staff members. Even so, after the committee reported that a majority of its members recommended that four of the offending books be restored to the library shelves, that a fifth be restored for use in the curriculum and that a sixth be restored but placed on a "restricted shelf," the school board overruled the committee on four of its recommendations, and proceeded to ban another book which the committee had not even had an opportunity to review and discuss (J.A. -79). A clear majority of the book review committee had voted for outright removal of only two of the disputed books, although there were tie votes on two others. The school board proceeded to vote for the removal of nine books. Only two books on the Watkins Glen list were actually restored to the shelves. The board did not give any reason for its failure to follow its appointed committee's recommendations (J.A. -75 to -79).

Following the school board's vote, the 17-year-old president of the student council, Steven Pico, along with three

other fellow students at the Island Trees High School, and one student at the Island Trees Memorial Junior High School, authorized the New York Civil Liberties Union to provide attorneys to bring suit on their behalf to enjoin the board's action.

The District Judge refused to issue an injunction, and sustained the board's action as being within its powers. On appeal, the Court of Appeals, by a 2-to-1 vote, ordered a trial of the case to determine, *inter alia*, the motivations behind the school board's action. The school board then petitioned the Court for a writ of certiorari, which was granted on October 13, 1981.

Summary of Argument

Local boards of education serve important discretionary functions in the education of the youth of their communities. Those functions, however, do not include any which "they may not perform within the limits of the Bill of Rights." *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 637 (1943). As the Court stated in *Barnette*,

> That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Id.

A function of our system of public education is to instill in children the democratic values of our community. If a state, or its designee, the school board, is permitted to use its power to suppress ideas, it undercuts those very values which it should be seeking to instill.

There is no dispute that, in order to accomplish the goal of educating children for citizenship, a school board may select curriculum and textbooks* on the basis of content. When, however, the board selects curriculum and textbooks to convey its own political, social or moral vision of the world as the correct view and purges competing ideas, it goes beyond what is permissible under the First Amendment. Although the line between indoctrination and permissible inculcation of values is not easily drawn, the students' right to be free from indoctrination is one that must be safeguarded, when necessary, by judicial review.

It is equally true that a school board may not select or ban library books in order to purge ideas and standardize thought. Moreover, since the school library serves a unique function as a forum for the communication of diverse ideas, any decision to limit access to library books raises acute constitutional concerns. A decision to limit access to library books on other than pedagogical grounds is always constitutionally impermissible.

Amicus, as a participant in the total educational enterprise and as a guardian over the library resources which provide the tools for free thought, urgently requests this Court to render a decision invalidating the actions of the board in this case and defining the parameters of the Constitution's protection of student access to school library collections.

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* N.Y. Educ. Law § 701(2) (McKinney Supp. 1981-82) defines textbooks as those which students are "required" to use in a class or program.

ARGUMENT

I.

The School Board's Censorship of Library Books Constituted State Indoctrination of Students Prohibited by the First Amendment.

From the very beginning of our independence, we Americans have known that freedom requires knowledge, and knowledge in large part is a matter of self-help. This credo was espoused by many early leaders:

Thomas Jefferson—"If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be." Letter to Charles Yancey (1816).

James Madison—"[D]iffusion of knowledge . . . is the only Guardian of true liberty." Letter to George Thomson (June 30, 1825) *reprinted in* T. Jefferson, *3 Letters and Other Writings of James Madison, Fourth President of the United States* 492 (1865).

Ralph Waldo Emerson—"Some books leave us free and some books make us free." Journal (December 22, 1839) *reprinted in 7 The Journals and Miscellaneous Notebooks of Ralph Waldo Emerson* ¶ 102, at 329 (1969).

It is not only the "great works of literature" that have value for readers:

Plato—"The worst of authors will say something which is to the point." *Phaedrus* (428-347 BC).

Oliver Wendell Holmes, Sr.—"The foolishest book is kind of a leaky boat on a sea of wisdom; some of the wisdom will get in anyhow." *The Poet at the Breakfast Table* 355 (1872).

Shorn of all rhetoric, this case presents a fundamental question: whether a school board, in the exercise of its

mandate to educate, may impose an ideological orthodoxy on the library books available to its students.

The wisdom of the judiciary's general reluctance to intervene in the business of education is unassailable. The normal functioning of education is best left to state and local authorities. When an issue of constitutional magnitude arises, however, the Court has stated:

> [W]e act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

West Virginia Board of Education v. *Barnette*, 319 U.S. at 640.*

The First Amendment must necessarily protect the student from state assaults aimed at indoctrination. If a state were free to tell its citizens what they must believe or to program them in such a way that they could believe nothing but that which the state officials condoned, the First Amendment's express guarantee of freedom of speech would be meaningless.

The Court in *Barnette* was confronted with the same underlying issue now presented in this case. The local school Board in *Barnette* adopted a regulation requiring that its students salute the American flag. The Court, striking down the regulation as an attempt to coerce patriotic sentiment, held:

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* *See also* Epperson v. Arkansas, 393 U.S. 97, 104 (1968), wherein the Court stated as follows:

> By and large, public education in our Nation is committed to the control of state and local authorities . . . . On the other hand '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,' *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960).

> We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power *and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.*

Id. at 642 (emphasis added). The Court continued:

> If there is any fixed star in our constitutional constellation, it is that *no official, high or petty, can prescribe what shall be orthodox* in politics, nationalism, religion, or other matters of opinion.

Id. (emphasis added).

A school board can no more coerce political and moral beliefs by purging all views inconsistent with its own than it can by forcing its students to recite a pledge of allegiance. The school board in each instance employs a means of indoctrination prohibited by the First Amendment.*

The facts in the record before the Court reveal, as respondents argue, a pervasive attempt by the board to indoctrinate the students of the district. It is particularly

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* Nothing in this Court's opinion in Ambach v. Norwick, 441 U.S. 68 (1979), is to the contrary. In *Ambach,* the question presented was whether, in furthering its interest in instilling in its pupils American civic values, a state would be permitted to bar aliens who had refused to become American citizens from becoming teachers in the public schools. Recognizing the discretion exercised by teachers in the classroom, the Court permitted the state to bar aliens "on the assumption that *generally* persons who are citizens, or who have not declined the opportunity to seek United States citizenship, are better qualified than are those who have elected to remain aliens." *Id.* at 81, fn 14 (emphasis in original). It is suggested by this that the state was concerned that the alien teacher could not fully understand and therefore was not fully qualified to transmit American civic values. Nothing in *Ambach* suggests that a state could require its teachers or its librarians to impose only one view of citizenship on the students to the exclusion of differing points of view.

telling that the board failed to consult its librarians, failed to include librarians in its appointed committee, rejected without explanation the recommendations of its teachers serving on the review committee, and failed to pay any attention to the professional literature concerning the books. These facts constitute persuasive evidence that the board took the action it did to impose "an official policy with regard to God and country of uncertain and indefinite content" (Op. 416). A motive to infringe the students' First Amendment right to be free from the imposition of such orthodoxy invalidates the board's decision. *Mt Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977).

II.

The School Library Is a Limited Public Forum Constitutionally Protected From State Intrusion.

The library historically has served a crucial function in the development of citizens in American society; it has provided a forum for the communication of diverse ideas. As the court recognized in *Minarcini* v. *Strongsville City Board of Education*, 541 F.2d 577, 582 (6th Cir. 1976):

> A library is a mighty resource in the free marketplace of ideas. . . (citations omitted). It is specially dedicated to broad dissemination of ideas. It is a forum for silent speech.

The communication of ideas within this forum, once created by a state, is constitutionally protected from censorship on the basis of the social, political or moral preferences of a local school board.

A. The Historical Development of the Library as a Forum for Communication of Ideas.

The history of public libraries in this country has been directly tied to the education of its youth. When Caleb

Bingham established what was to become the first tax-supported library in the United States of America in 1803, it was expressly created for the "primary" use of "children." Bingham, a former schoolmaster who had become a Boston bookseller, presented a gift of 150 books to the townspeople of his native town of Salisbury, Connecticut. He wrote to his brother explaining the reasoning behind his actions:

> I well remember when I was a boy how ardently I longed for the opportunity of reading, but had no access to a library. It is more than probable that there are, at the present time, in my native town, many children who possess the same desire and who are in the like unhappy predicament. This desire, I think I have it in my power in a small degree to gratify, and however whimsical the project may appear to those who have not considered the subject, I can not deny myself the pleasure of making the attempt. I have selected from my shelves 150 volumes for the sole use of the children of Salisbury, from nine to sixteen years of age.

(From a pamphlet published by the Scoville Memorial Library, Salisbury, Conn.).

The role of libraries as an extension of the educational process has long been accepted. In 1852, a group of citizens, attempting to organize Boston's first public library, issued a report written by Edward Everett and George Ticknor which stated the case for creating such an institution:

> Reading ought to be furnished to all, as a matter of public policy and duty, on the same principle that we furnish free education, and in fact, as a part, and a most important part, of the education of all. For it has been rightly judged that—under political, social and religious institutions like ours —it is of paramount importance that the means of

> general information should be so diffused that the largest possible number of persons should be induced to read and understand questions going down to the very foundations of social order, which are constantly presenting themselves, and which we, as a people, are constantly required to decide, and do decide, either ignorantly or wisely.

Report of the Trustees of the Boston Public Library (1852). The Boston Public Library opened its doors two years later.

Andrew Carnegie, who did more than any other single individual to stimulate the spread of public libraries to cities, towns and villages throughout the country, was motivated primarily by his belief that young people should have the opportunity to read what they want to read. Carnegie, as a young child, was employed as bobbin boy in a cotton factory in Allegheny City, Pennsylvania. A local citizen opened his private library for use by the working boys in town. Andrew went to his benefactor's house every Saturday afternoon to borrow a new book. He later wrote:

> It was when revelling in the treasure which he opened to us that I resolved, if ever wealth came to me, that it should be used to establish free libraries, that other poor boys might receive [similar] opportunities.

By the time of his death in 1919, Andrew Carnegie had financed the construction of 2,500 new public libraries; more were built under his will. All were intended primarily to benefit "other poor boys." W. Seymour & E. Layne, *For the People, Fighting for Public Libraries* 10 (1979).

Others of our most prominent leaders received their educations through use of the public libraries. Typical of these was Jacob K. Javits, who, as a member of the United States Senate (and soon to be a lead sponsor on

the proposed National Library and Information Services Act to provide equal library services to all citizens), told the witnesses at a Senate hearing of his childhood use of the public library:

> I am sure I would not be here were it not for the Rivington Street Public Library and the amount of extra schoolwork I was able to do. And I know other kids just like me who had exactly the same experience, who have had an appetite for learning, and you couldn't possibly satisfy it on a regular curriculum.

Id. at 36.

In the Midwest, another "juvenile" was able to find a substitute for a college education by reading every single book on the shelves of the Independence, Missouri Public Library by the time he was fourteen. So equipped, he went on to become President of the United States, the only president in this century who never attended college. President Harry S. Truman later told the head of the American Library Association, "Everything I know—except my law—I learned through the public library." *Id.* at 130.

The foregoing highlights of the history of the American library movement underscore that, from the beginning, the library has been a forum where young people might engage in independent inquiry necessary to the development of critical and independent thought. The library was a place where a wide range of relevant materials would be available to an inquiring young mind.

B. Valid Criteria for Content-Based Decisions in the Acquisition and Removal of School Library Books.

New York, in establishing school libraries, has recognized and adopted the historical model. Thus, the state regulations

governing school library collections require that a library provide "an adequate complement to the instructional program" and shall have at least 1,000 titles for secondary schools in which average daily attendance is fewer than 200 pupils up to at least 8,000 titles for secondary schools in which average daily attendance is more than 1,000 pupils. [1981] N.Y.C.R.R. § 91.1.

Within this state-created forum, books are to be chosen on the basis of whether they "complement" the instructional program by providing ideas and information necessary to make up the whole, to fill in the gaps. Within this framework, petitioners may argue that they may make a determination, for example, that a history of political parties in the United States not be included as a course in the curriculum. Should such a determination be made, the board arguably could direct that the school libraries not purchase books on that subject. In that sense, the school library is a limited public forum. L. Tribe, *American Constitutional Law* 690 (1978). However, once the board has set the broad parameters of the forum based on the curriculum taught in the schools, it may not constitutionally direct that libraries be stocked with 1000 to 8000 titles in its library which mirror its views while denying access to books which express less favored views:

> There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.

Police Department v. *Mosely*, 408 U.S. 92, 96 (1972) (quoting A. Meiklejohn, *Political Freedom: The Constitutional Powers of The People* 27 (1948)). *See also Widmar* v. *Vincent*, 50 U.S.L.W. 4062 (U.S. Dec. 8, 1981).

Within the limits of the school library forum, and consistent with the forum's purpose, book selection for school libraries must be based upon a book's relevance to the curriculum and its pedagogical value. Pedagogical value is measured by reference to the professional literature regarding the book's educational value, the author's reputation and style of writing, and other related criteria. Book selection for school libraries cannot be based on whether the book conveys a particular political, moral or social message. A selection on such a basis would be in patent violation of the decisions of this Court in *Mosely* and *Widmar*. By the same token, a decision to remove a book from the library shelves may be based on pedagocical standards alone.*

Since the school board itself admitted that its decision to ban the nine books was based on the political, moral and social viewpoints expressed in the books, and nothing in the record would support a finding that the board's action was in furtherance of a compelling state interest, respondents are entitled to a decision in their favor.

III.

The School Board's Abuse of Established Tradition, Practice and Policy Had a Chilling Effect on Speech.

Benjamin Franklin was one of the nation's first community librarians. Although he may have lacked professional training as such, he brought special qualities to the job. The most significant was his understanding of the

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* The board has offered as an after-the-fact justification for its actions an argument that the books at issue were not relevant to the curriculum. However, its president admitted that the board did not direct the staff not to discuss the banned volumes or the ideas contained therein (J.A. -28), thereby conceding that such books and ideas were relevant to the curriculum.

importance of providing library materials reflecting opposing sides of current issues. He later wrote about his part in organizing America's first community lending libraries:

> These libraries have improved the general conversation of Americans, made the common tradesman and farmers as intelligent as most gentlemen from other countries, and perhaps have contributed in some degree to the stand so generally made throughout the colonies *in defence of their privileges.*

B. Franklin, *The Autobiography of Benjamin Franklin* 69 (1850) (emphasis added).

Librarians have come a long way since Franklin's day. They now are professionally trained and state certified. They have professional organizations, ethical standards, and professional journals. They have earned the right to perform as professionals. Like the doctor, the lawyer and the priest, they are given a basic job to do, and are then left to their skills, experience and judgment.

Although the early development of public libraries was to a large extent for the purpose of educating the country's youth, the "school library" as such did not play a significant part in public education until after World War II. In 1945, a set of national standards for school libraries was adopted. A second set of standards was adopted in 1960 which covered professional qualifications, education and the specific responsibilities of school library staffs. Included among the latter standards was a careful description of the recommended selection procedure and the scope of school library materials. The goal set by the professionals in those standards was to achieve collections which were "well-balanced" and "well-rounded". The standards specifically incorporated the principles of the *School Library Bill of Rights* (see Appendix B).

The role and responsibility of the professional school librarian in upholding the quality of the school library collection was described as follows:

> A wealth of excellent material is available for children and young people, and there is no justification for the collections to contain materials that are mediocre in presentation and content. By virtue of their professional preparation and experience, librarians have the special competencies that enable them to evaluate materials critically. . . . They are familiar with and guided by the established criteria for the evaluation and selection of materials. They consult standard tools and reliable guides for the selection of materials and go beyond the limits of these sources whenever they have the opportunity to examine and to evaluate materials carefully before purchase.

Standards of the American Library Association 74 (1960).

In 1970, the board of directors of the American Association of School Libraries approved a statement of "policies and procedures for selection of instructional materials." The statement contained a recommendation that each local school board adopt its own written statement of policy regarding selection procedures which would, among other things, specifically delegate the selection of library materials to the professional staff, set forth the general criteria for selection and include a procedure for handling complaints concerning specific titles. The recommended procedure included a review committee to read the challenged material, to check professional reviews and to evaluate the work as a whole.

These recommendations are almost identical to those made by School Superintendent Morrow to the Island Trees school board. The recommendations were at first disre-

garded, then put into operation without professional librarians' participation, and then repudiated by the board's own final actions.

The *ad hoc* method by which the Island Trees school board banned the literature in question in this case served as an unambiguous signal to school librarians and other professionals to confine their book selections to those books they believed the board would find ideologically palatable, no matter how meritorious other books might be, and not to resist any subsequent challenge to the appropriateness of a particular book.

The participation of professional librarians and teachers in the process of selecting and reviewing library books ensures that a school board, in the course of fulfilling its desire to instill community values through the selection of curriculum and textbooks, will not impermissibly impose its own orthodoxy. *See* Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment,* 57 Tex. L. Rev. 863, 874-82 (1979).

The method by which the Island Trees school board conducted its purge was calculated to prevent students' frank expression of views and to stifle the exercise of professional judgment by trained librarians who today perform the role of ensuring access to competing ideas and guarding against political and moral indoctrination in the educational system. This result invalidated the board's action, independent of the board's motives. *Keyishian* v. *Board of Regents,* 385 U.S. 589, 604 (1967).

CONCLUSION

Speaking at the 175th anniversary of the Bingham Library for Youth in Salisbury, Connecticut on October 14, 1978, former New York Times correspondent Harrison Salisbury contrasted America's open libraries with the tight control exercised by the Soviet Union over its libraries. Salisbury characterized the net effect of that control as "books in chains":

> If you go to the Lenin library, the greatest in Russia, the equivalent of our Library of Congress, you find that it's like a maze. There is a card catalog but only a small number of books are in that catalog. To pass through to the next calalog you must have security clearances which are not easy to get. You can go through one drawer after another, like an old Chinese puzzle, and at the end there will be enormous catagories of books which you cannot get unless you are a member of the Politburo itself or someone in the Kremlin. *Each successive Soviet change in government consign thousands of books to forbidden areas where no one has access.* (Emphasis added).

That is exactly what the Island Trees school board did in this case.

The school library is a broader forum than the school curriculum and its textbooks; the library provides access to balanced and diverse ideas and serves as a safety valve to ensure against intellectual and doctrinal rigidity. The contents of libraries cannot be left to the mercy or whim of citizen activists whose tenure in office depends on their popularity at the polls.

For the reasons set forth, respondents are entitled to a decision in their favor.

Respectfully submitted,

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Of Counsel

December 30, 1981

APPENDIX A

Background material from professional library journals on the nine books removed from Island Trees school library.

1. ARCHER, Jerome W. *A Reader For Writers, A Critical Anthology of Prose Readings.*

> [The Table of Contents for this Anthology appears in the Joint Appendix at pages J.A. -132 through -137. Samples of prose writings by several dozen authors are included, among them: Wolcott Gibbs, Mark Van Doren, Arthur M. Schlesinger, Barbara Ward, Anthony Trollope, Gilbert Highet, Robert Benchley, Russel Lynes, Aldous Huxley, John F. Kennedy, James Madison, Alexis de Tocqueville, Thomas Jefferson, Jonathan Swift, Joseph Conrad, James Thurber, and others.]

2. CHILDRESS, Alice. *A Hero Ain't Nothin but a Sandwich.* 126p. Coward. Oct. 1973. CSm $5.95. ISBN 0-698-20278-3. L.C. 73-82035.

> *Gr 7 Up*—Tense, terse, and dramatic, this is a fine first novel by a black playwright. Why 13-year-old Benjie is an addict evolves through chapters that read like scenes in a play and are told from the various viewpoints of the people Benjie knows in Harlem: the pusher, his friends, teachers, grandmother, mother, her common-law husband, Butler —and Benjie himself. Each emerges as vital pathetic, striving, hopeless or helpless, but, above all, human. At first, Benjie will not face the reality of his habit: "I can't stand nobody lyin. . . . Why folks got to lie and say I'm on skag, say I'm a junkie? . . . I *take* somethin sometime, but I ain't no user." Caught nodding in class, he is put in the hospital to be detoxed. He begins to face the truth and admits that he resents Butler as a replacement for

the father who ran out. Benjie vents his rage by stealing Butler's good clothes to get money and so drives out the only hero in his life who might be more than "a sandwich." Butler, however, doesn't go far and is there to save Benjie from plunging off the roof of their building. Only then does the boy believe that someone really cares about him. Butler moves back. Benjie calls him Dad and seems to want to go straight. In the end, Childress makes poignantly clear that it's not enough to have someone else believe in him—Benjie must believe in himself. Written in tough street language, liberally sprinkled with four-letter words and cynical humor, this is a powerful depiction of loss. It takes its place beside June Jordan's *His Own Where* (Crowell, 1971).—*Alice Miller Bregman, "School Library Journal"*

Library Journal, 10/15/73, p. 3153

Other Writings by the Same Author:

Like One of the Family: Conversations from a Domestic's Life, Independence Press, 1956; *Wine in the Wilderness* (play), Dramatists Play Service, 1970; *Mojo* [and] *String* (two one-act plays), Dramatists Play Service, 1971; (editor) *Black Scenes: Collection of Scenes from Plays Written by Black People about Black Experience,* Doubleday, 1971, paperback edition published as *Black Scenes,* 1971.

Unpublished plays: "Trouble in Mind," produced Off-Broadway, 1955-56; "Wedding Bank," first produced at University of Michigan, 1966, produced Off-Broadway at Public Theatre, 1972.
Also author of "Gold through the Trees."

Appendix A

Awards and Honors:

Village Voice, Obie Award for best original Off-Broadway play, 1956, for "Trouble in Mind."

Contemporary Authors, New Revision Series, Vol. 1, p. 93

3. CLEAVER, Eldridge. *Soul on Ice.* 210p. (Ramparts Books), McGraw. 1968. $5.95. 67-27277.

YA—This is soul music, soul writing. The pages pulse with the feelings and thoughts of a man who has found his identity. Eldridge Cleaver, in his own words is "a fulltime revolutionary in the struggle for black liberation in America"; he is Minister of Information for the Black Panther Party for Self-Defense, an ex-Muslim, an admirer of Malcom X, and an eloquent spokesman for black men in pursuit of full freedom and equality. Cleaver offers an analysis of American society that cuts away what he feels are the euphemisms and myths that have cloaked our motives and actions at home and abroad. To him and to many others who have removed their rose-colored glasses, we appear to be racists and imperialist colonizers. There is anger, outrage, bitterness, and despair here, for Cleaver feels that white America is still not ready to see the black man as a bona fide human being. Nevertheless, the book is hopeful. Cleaver is effective because of his directness on such matters as black unity, American mores, manhood and sex. In clear, and sometimes earthy, language he tells it as he sees it. This is a powerful, moving plea for a better world—not only for black people, but for us all. *See LJ,* February 1, p. 564.—*Sumika Yamashita. Oakland Public Library, Calif.*

Library Journal, April 15, 1968

Appendix A

Other Writings by the Same Author:

Eldridge Cleaver: Post-Prison Writings and Speeches, 1969; *Eldridge Cleaver's Black Papers,* 1969; (author of introductions) Jerry Rubin, *Do It!,* 1970; also author, with others, of *War Within: Violence or Nonviolence in Black Revolution,* 1971.

4. *Go Ask Alice* [Author Anonymous]. 159p. Prentice-Hall, 1971. CSm. $4.95. ISBN 0-13-357111-4. LC 74-159446.

Gr 8 Up—This diary of a 15-year-old girl powerfully depicts all the confusion, loneliness and rebellion associated with adolescence. It documents two years in the life of a middle-class, suburban girl whose use of drugs to cover up her insecurities leads her into nightmare experiences. Unlike other "true-to-life" stories, this *is* true (it's based on an actual diary). The book expresses with an innocent and believable candor the attitudes which are so characteristic of adolescence, and its impact derives from its modest claims and unpretentious style. Laying bare her life to her diary, the author recounts her experiences (in school, at home and at parties; in San Francisco; using and pushing) in four-letter word strewn language which will undoubtedly offend many parents whose kids (not to mention the parents themselves) would benefit from reading this. An epilogue informs readers that the author "died three weeks after her decision not to keep another diary" of an overdose that could have been either premeditated or accidental. An important book, this deserves as wide a readership as libraries can give it.

—Jack Forman, Woodbridge Free Public Library, N.J.

Library Journal, 3/15/72, p. 1174

Based on an actual diary this is the "story of a fifteen-year-old, white, middle-class girl unsuspectingly introduced to LSD who immediately becomes an avid user of any drug available. Covering a two-year period the narrative is a . . . firsthand picture of life within the drug culture—the fellow initiates, trips, sex, and degradation. Although Alice makes several attempts to pull herself away from drugs and seems close to succeeding at the end of the book, a brief epilog tells of her death from an unexplained overdose."

Senior High School Library Catalog
11th Ed., 1977, p. 224

5. HUGHES, Langston. *The Best Short Stories by Negro Writers.* 512p. Little, 1967. $7.95. 67-11221.

These 46 short stories by Negro writers compose an excellent collection. Several of the stories here reprinted have appeared in a similar volume recently edited by John Henrik Clarke. However, the Hughes collection is superior by far and should be given first preference. Good stories by the old hands—Richard Wright, Willard Motley, Owen Dodson, Frank Yerby, and Alston Anderson—are present, but newer writers, such as Pearl Crayton, Kristin Hunter, Charlie Russell, Ernest G. Gaines, Clifford Vincent Johnson, and Woodie King, Jr., are well represented also. Helpful biographical notes appear at the back of the volume. Recommended for both

public and college libraries.—*Louise Giles, Oakland Community College, Union Lake, Mich.*

Library Journal, 2/1/67, p. 595.

Other Writings by the Same Author:

Novels: Not without Laughter. Knopf, 1930, reprinted, Macmillan, 1969; *Tambourines to Glory,* John Day, 1958, reprinted, Hill & Wang, 1970.
Short stories: The Ways of White Folks, Knopf, 1934, reprinted, 1963; *Simple Speaks His Mind,* Simon & Schuster, 1950; *Laughing to Keep from Crying,* Holt, 1952; *Simple Takes a Wife,* Simon & Schuster, 1953; *Simple Stakes a Claim,* Rinehart, 1957; *Something in Common and Other Stories,* Hill & Wang, 1963; *Simple's Uncle Sam,* Hill & Wang, 1965.
Autobiography: The Big Sea: An Autobiography, Knopf, 1940, reprinted, Hill & Wang, 1963; *I Wonder as I Wander: An Autobiographical Journey,* Rinehart, 1956.
Nonfiction: (With Roy De Carava) *The Sweet Flypaper of Life,* Simon & Shuster, 1955; (with Milton Meltzer) *A Pictorial History of the Negro in America, Crown,* 1956, 4th edition published as *A Pictorial History of Blackamericans,* 1973; *Fight for Freedom: The Story of the NAACP,* Norton, 1962; (with Meltzer) *Black Magic: A Pictorial History of the Negro in American Entertainment,* Prentice-Hall, 1967; *Black Misery,* Paul S. Erickson, 1969.
Also juvenile books, poetry, translations, plays, and screenplays.

Contemporary Authors, New Revision Series, Vol. 1, p. 286

Appendix A

Awards and Honors:

Opportunity magazine literary contest, first prize in poetry, 1925; Witter Bynnner undergraduate poetry prize contests, first prize, 1926; *Palms* magazine Intercollegiate Poetry Award, 1927; Harmon Gold Medal for Literature, 1931; Guggenheim fellowship for creative work, 1935; Rosenwald fellowship, 1941; Litt.D., Lincoln University, 1943; American Academy of Arts and Lettters, grant, 1947; Anisfeld-Wolfe Award for best book on racial relations, 1954; Spingarn Medal, National Association for the Advancement of Colored People, 1960.

Contemporary Authors, New Revision Series, Vol. 1, p. 286

6. MALAMUD, Bernard. *The Fixer.* 352pp. Farrar, Sept. $5.75. 66-20164.

There is none of the lightness of *A New Life,* but some of the symbolic feeling of *The Natural* in this powerful novel, which is certainly a major opus. Malamud has used as his source an actual court case in Kiev in 1913, when a Jew, Mendel Beiliss, was imprisoned and accused of ritual murder of a youth, in an attempt by the autocratic government to defame the Jews and associate them with liberal groups seeking emancipation. But the political element—or any external element—though present, plays little part in this novel. It is the story of the accused—here one Yakov Bok, an odd-job man—almost month by month through the grim three years in prison awaiting trial, where the attempts to make him confess encompassed not only personal indignities and torture but every other calculated effort to degrade and dehumanize a soul—loss of hope, of

trust in others, of spiritual consolation, of any basic communication with another. In the subtlest way, also, however, Malamud is showing a man grasping on to righteousness in his innocence till he can maintain his reason and compassion and finally achieve an understanding of the purpose of freedom in the mere existence of mankind and the need to defend this freedom. Superb in its meticulous analysis, its dramatic climaxes, this has a philosophic implication that in retrospect is reminiscent of *The Plague.* But in the actual reading (perhaps this is a personal reaction) it is a harrowing experience—so much so that at times it seems long and overdetailed.—*Rival. Brester, Head, Fict. Dept., Los Angeles, Calif., P.L.*

Library Journal, July, 1966, p. 340

Other Writings by the Same Author:

The Natural (novel), Harcourt, 1952; *The Assistant* (novel), Farrar, Straus, 1957; *The Magic Barrel* (stories), Farrar, Straus, 1958; *A New Life* (novel) Farrar, Straus, 1961; *Idiots First* (stories), Farrer, Straus, 1963. Contributor of short stories to *Partisan Review, Harper's Bazaar, New Yorker, Commentary,* and to *Best American Short Stories.*

Awards and Honors:

Partisan Review Fellow in fiction, 1956-57; Rosenthal award, 1958, for *The Assistant;* Daroff Memorial award, 1958, for *The Assistant;* National Book Award in fiction, 1959, for *The Magic* Barrel; Ford Fellow in humanities and arts, 1959-61.

Contemporary Authors, Vol. 7-8, p. 340

7. MORRIS, Desmond. *The Naked Ape: a Zoologists' Study of the Human Animal.* 256 p. bibliog. McGraw. 1968. $5.95. 67-29198. NAT HIST

This book is a worthwhile attempt to discuss man's behavioral patterns in the same manner as one would those of any other primate. Unfortunately, in his treatment of the subject, Dr. Morris, a zoologist, leaves much to be desired. His book is unevenly written: some chapters are fairly well written; others are very badly written. Dr. Morris feels free to present hypotheses as fact and sand castles as hypotheses. For example, in the chapter on sex, the somewhat questionable statement: "The protuberant, hemispherical breasts of the female must surely be copies of the fleshy buttocks, and the sharply defined red lips around the mouth must be copies of the red labia," is hedged by no less than two "ifs," three "supposing's," and one "might," including a description of the derriere of a hypothetical female ancestor whose postulated attributes are not amenable to scientific examination since they are not readily fossilized. To the statement "The penguin achieves the number one avian position [of popularity among children] because it is the most vertical of all the birds," one might properly inquire why a child should consider a penguin more vertical than an ostrich, especially when Dr. Morris describes the similarly proportioned giraffe as "permanently vertical" in explaining its popularity. The whipping of schoolboys by schoolmasters is described as "an ancient primate form of ritual copulation with their pupils." Even for popularized science, perhaps the term which best fits Dr. Morris's approach to his subject is "extravagant."—*John D.*

Buffington., Environmental Biology Task Force, Ft. Detrick, Frederick, Md.

Library Journal, 1/1/68, p. 91

Other Writings by the Same Author:

The Reproductive Behavior of the Ten-Spined Stickleback, E. J. Brill, 1958; *The Story of Congo* (juvenile), Batsford, 1958; (editor with Caroline Jarvis) *The International Zoo Yearbook,* Zoological Society of London, Volume I, 1959-60, Volume II, 1960-61, Volume III, 1961-62, Volume IV, 1962-63; *Introducing Curious Creatures,* Spring Books, 1961; *The Biology of Art: A Study of the Picture-Making Behaviour of the Great Apes and Its Relationship to Human Art,* Knopf, 1962; *Apes and Monkeys* (juvenile), Bodley Head, 1964, McCraw, 1965; (with wife, Ramona Morris) *Men and Snakes,* McGraw, 1965; *The Mammals: A Guide to the Living Species,* Harper, 1965; *The Big Cats* (juvenile), McGraw, 1965; *Zoo Time* (juvenile), Hart-Davis, 1966; (with Ramona Morris) *Men and Apes,* McGraw, 1966; (with Ramona Morris) *Men and Pandas,* Hutchinson, 1966, McGraw, 1967; (editor) *Primate Ethology,* Aldine, 1967; *The Human Zoo* (Book-of-the-Month Club selection), McGraw, 1969; *Patterns of Reproductive Behaviour: Collected Papers* (all previously published in journals), J. Cape, 1970, McGraw, 1971; *Intimate Behaviour,* J. Cape, 1971, Random House, 1972. Contributor to journals, including *Behaviour, British Birds, New Scientist,* and *Zoo Life.*

Awards and Honors:

Statuette with Pedestal from World Organization for Human Potential, 1971, for *The Naked Ape* and *The Human Zoo.*

Contemporary Authors, Vol. 45-48 p. 389

8. THOMAS, Piri. *Down These Mean Streets.* 352p. Knopf. 1967. $5.95. 66-19402. SOC SCI

Some of the more interesting books published in recent years have dealt with the problems of minority groups. This is such a book. It recounts the adolescent and early adult experiences of Piri Thomas, an American of Puerto Rican descent and the oldest and darkest of seven children. Mr. Thomas deals in depth with the indentity problems of dark Puerto Ricans and the subtle, and sometimes not so subtle, prejudice and discrimination they face in the United States. It is a story involving adolescent gangs, petty larceny, sex, building a "rep," trouble in school, welfare, an ambivalent father-son relationship, armed robbery, prison, eventual parole, and movement toward a new life. The language of the book is the language of the streets. However, it is well written, and the reader will gain considerable insight into life in Spanish Harlem and the difficulties faced by Puerto Ricans in this country. It can be expected that this book will have broad appeal among specialists and general readers.—*Morris A. Forslund, Sociology Department, University of New Mexico, Albuquerque*

Library Journal, 4/15/67, p. 1637

Other writings by the same author:

"The Golden Streets" (two-act drama), first produced in New York City at Riverside Park by Puerto Rican Traveling Theatre, September 9, 1970, *Saviour, Hold My hand* (authobiography), Doubleday, 1972; *Seven Long Times* (autobiography), Praeger, 1974; (author of introduction) Lefty Barretto, *Nobody's Hero: A Puerto Rican Story,* New American Library, 1977.

Appendix A

Awards and Honors:

Rabinowitz Foundation grant, 1962; Lever Brothers community service award, 1967.

Contemporary Authors, Vol. 73-76, p. 604

9. VONNEGUT, Kurt. *Slaughterhouse-Five: Or, the Children's Crusade.* 186p. $5.95. Seymour Lawrence: Delacorte. LC 69-11929.

YA—Kurt Vonnegut, in Dresden at the time of the Allied air-raids which killed more people than the atomic bomb at Hiroshima, was kept with his fellow prisoners of war in a most unpleasant place, a slaughterhouse. Struggling to record this experience for over 20 years, Vonnegut found that the only way to do so was as a novel of absurd black humor, science fiction. Awkward, inept, unprepossessing anti-hero Billy Pilgrim, a barably married, successful dentist and the father of a Green Beret, finds himself unstuck in time and able to experience events in his past, present, and future lives in completely jumbled order. For example, an event he returns to frequently is his capture by the Tralfamadoreans and his transport to their planet, where he's kept in a zoo. The novel throughout wryly comments on the human condition and on American attitudes and mores; always, however, it comes back to focus on the terrible events of 1944-45 and Pilgrim's own progress to the Dresden holocaust. Some ribald scenes and rough language may limit the book to senior high school students, who will find that it does justice to Mr. Vonnegut's reputation, first established for YAs with *Cat's Cradle* (Holt, 1963). See *I.J.*, Mar. 1, p. 1021—*Nancy Menken, Alhapibra High School Library, Martinez, Calif.*

Libary Journal, 12/15/69, p. 4624

Appendix A

Other writings by the same author:

—*Novels:* published by Delacorte, except as indicated: *Player Piano,* Scribner, 1952, reprinted Dell 1974; *The Sirens of Titan,* Dell, 1959; *Canary in a Cathouse* (short stories), Fawcett, 1961; *Mother Night,* Fawcett, 1962; *Cat's Cradle,* Holt, 1963; *God Bless You, Mr. Rosewater, or Pearls before Swine,* Holt, 1965; *Welcome to the Monkey House: A Collection of Short Works,* 1968; *Slaughterhouse Five,* 1969; *Breakfast of Champions, or Goodbye Blue Monday,* 1973; *Wampeters, Foma and Grand Balloons: Opinions* (essays), 1974; *Slapstick, or Lonesome No More,* 1976; *Jailbird,* 1979; (with Ivan Chermayef) *Sun Moon Star, Harper,* 1980.

Awards and Honors:

Guggenheim Fellow, Germany, 1967; National Institute of Arts and Letters grant, 1970; Litt. D., Hobart and William Smith Colleges, 1974.

Contemporary Authors, New Revision Series, Vol. 73-76, p. 604; Vol. 1, p. 678

APPENDIX B

THE LIBRARY BILL OF RIGHTS

(Adopted June 18, 1948.
Amended February 2, 1961, and June 27, 1967, by the ALA Council)

The Council of the American Library Association reaffirms its belief in the following basic policies which should govern the services of all libraries:

1. As a responsibility of library services, books and other library materials selected should be chosen for values of interest, information, and enlightenment of all the people of the community. In no case should library materials be excluded because of the race or nationality or the social, political, or religious views of the authors.
2. Libraries should provide books and other materials presenting all points of view concerning the problems and issues of our times; no library materials should be prescribed or removed from libraries because of partisan or doctrinal disapproval.
3. Censorship should be challenged by libraries in the maintenance of their responsibility to provide public information and enlightenment.
4. Libraries should cooperate with all persons and groups concerned with resisting abridgment of free expression and free access to ideas.
5. The rights of an individual to the use of a library should not be denied or abridged because of his age, race, religion, national origins, or social or political views.

6. As an institution of education for democratic living, the library should welcome the use of its meeting rooms for socially useful and cultural activities and discussion of current public questions. Such meeting places should be available on equal terms to all groups in the community regardless of the beliefs and affiliations of their members, provided that the meetings be open to the public.

SCHOOL LIBRARY BILL OF RIGHTS

(Approved by American Association of School Librarians Board of Directors, 1969)

The American Association of School Librarians reaffirms its belief in the Library Bill of Rights of the American Library Association. Media personnel are concerned with generating understanding of American freedoms through the development of informed and responsible citizens. To this end the American Association of School Librarians asserts that the responsibility of the school library media center is:

To provide a comprehensive collection of instructional materials selected in compliance with basic written selection principles, and to provide maximum accessibility to these materials.

To provide materials that will support the curriculum, taking into consideration the individual's needs, and the varied interests, abilities, socioeconomic backgrounds, and maturity levels of the students served.

To provide materials for teachers and students that will encourage growth in knowledge, and that will

develop literary, cultural and aesthetic appreciation, and ethical standards.

To provide materials which reflect the ideas and beliefs of religious, social, political, historical, and ethnic groups and their contribution to the American and world heritage and culture, thereby enabling students to develop an intellectual integrity in forming judgments.

To provide a written statement, approved by the local Boards of Education, of the procedures for meeting the challenge of censorship of materials in school library media centers.

To provide qualified professional personnel to serve teachers and students.

Office - Supreme Court, U.S.
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No. 80-2043

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26, *et al.*,
Petitioners,

v.

STEVEN A. PICO, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE*

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE*

INTEREST OF THE *AMICUS CURIAE* *

The National Education Association (NEA) is the largest teacher organization in the United States, with a membership of approximately 1.7 million educators, virtually all of whom are employed by public educational institutions. The organization is deeply committed to preserving and fostering academic freedom in all its aspects. Thus, NEA's governing resolutions urge, among other things, "the removal of laws and regulations which restrict the selection of a diversity of instructional materials or which limit educators in the selection of such materials"; that supplementary instructional materials

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* The parties have consented to the filing of this brief, which is submitted in support of the respondents in this case.

"contain a number of points of view to allow students to become familiar with the attitudes and recommendations of various segments" of the populace; and that "controversial issues should be a part of instructional programs when . . . appropriate to the curriculum and to the maturity level of the student." NEA endeavors to advance these precepts through persuasion, collective bargaining, legislative efforts and, when necessary, litigation. These interests of NEA are directly implicated in the issues before the Court in the instant case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The District Court in this case entered summary judgment for defendants, thus rejecting—without benefit of trial—plaintiffs' claims that defendants' challenged actions were motivated by considerations impermissible under the First Amendment. The Second Circuit, in the decision now under review, reversed upon determining that the record contained sufficient evidence that defendants acted with impermissible motives to warrant a trial of plaintiffs' claims. Thus, the issue in this case is not whether plaintiffs have conclusively proved their claims, but whether plaintiffs are entitled to a full opportunity to prove them at trial. The resolution of this issue depends upon whether plaintiffs' claims, if proven, would as a matter of law warrant relief, and upon whether plaintiffs have adduced sufficient evidence in support of their claims to create genuine issues of material fact. Plaintiffs have crossed both of these hurdles.

The controversy in this case arose when petitioner Board of Education ordered the removal of nine books from the libraries of all junior and senior public high schools in the Island Trees Union Free School District and prohibited the use of the books in the curricula of those schools. Plaintiffs adduced evidence before the District Court—including, *inter alia*, admissions by the Board president—that "conservative principles" under-

lay the Board's action in this case. *Pico* v. *Board of Educ.*, 474 F.Supp. 387, 391 (E.D.N.Y. 1979). The Board president stated that he objected to the books partly because of "their irrelevance . . . to the values which [he], as a board member and president, [felt] the community wishe[d] inculcated in its youth." *Id.*, at 392. And the defendants acknowledged that the "dominant factor" motivating the Board's expungement of the books was the Board members' "conservative philosophy of morals and traditional values. . . ." *Ibid.* The "conservative philosophy . . . and traditional values" that the Board meant to uphold were indicated by the particular books suppressed and the reasons the Board gave for the suppression. Thus, for example, in pursuit of its goal of excluding "anti-American" [1] books, the Board disapproved the book, *A Hero Ain't Nothing But a Sandwich*, because it discussed the fact that George Washington was a slave owner, and the book, *A Reader for Writers*, partly because it "equate[d] Malcolm X[,] considered by many to be a traitor in this country, with the founding fathers of our country." Ahrens Affidavit, A-1.[2]

We do not dispute that school authorities may properly endeavor to inculcate in students those "fundamental values necessary to the maintenance of a democratic political system" as well as those skills that prepare students for effective "participation as citizens" in a democratic society. *Ambach* v. *Norwick*, 441 U.S. 68, 76-77 (1979); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534 (1925).

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[1] 474 F.Supp., at 390.

[2] The quote is from a document produced by a politically militant parents group that influenced the Board's action in this case. The document is attached as an exhibit to the Board president's affidavit and was incorporated into the affidavit by reference. Ahrens Affidavit, ¶¶ 6, 10. See *Pico* v. *Board of Educ.*, 638 F.2d 404, 407-408 (2d Cir. 1980). The significance of the political views of the above-mentioned parents group to the Board's decisions challenged in this case is, at the least, a factual issue that bears full exploration at trial.

Nor do we deny that school officials possess broad discretion to determine how best to accomplish these ends. But we will demonstrate herein that the First Amendment limits both the subjects of permissible governmental indoctrination of school students entrusted to the state's charge, and the methods by which the state may pursue indoctrination even as to permitted subjects. The record in this case contains factual issues as to whether these limitations were exceeded in this case.

In part I, *infra*, we show that the First Amendment restricts the subject areas in which the state may adopt, and seek to inculcate in students, a particular point of view. While school officials may permissibly attempt to impart those skills that make for full and effective participation in all facets of our society and to transmit the basic "values on which our society rests," *Ambach* v. *Norwick*, 441 U.S., at 76, they may not seek to instill in students a preference for a particular side in matters of political or social opinion that are open to genuine controversy within our society. There is evidence in this case that the school board's suppression of at least some of the nine books was motivated by disapproval of ideas that the state was not constitutionally free to condemn.

In part II, *infra*, we show that even assuming *arguendo* that the school board's intention in this case was to preserve and transmit values that the state is free constitutionally to instill, there is at least a triable issue whether the method chosen to accomplish those objectives was consistent with the First Amendment. As to those subjects in regard to which a school board may properly seek to presuade students to a particular point of view, it may do so by such means as reason, explanation, example, and rebuttal; but it may not, absent compelling reasons, do so by purposefully insulating students from facts or arguments that support a competing view. This is not to say that school authorities cannot exclude educational materials for any number of reasons un-

related to the state's disagreement with the social or political views expressed therein. But the state abuses its power when it undertakes such exclusion simply to deny students exposure to views not favored by the state. The record in this case contains evidence that the Board violated this principle.

ARGUMENT

I. LIMITATIONS ON SUBJECTS OF INDOCTRINATION

A. The Constitutional Principle

As this Court has recognized, the state has a legitimate interest in "prepar[ing] individuals for participation as citizens" and in perpetuating "the values on which our society rests." *Ambach* v. *Norwick*, 441 U.S., at 76. So that the state may advance this legitimate and important interest, it has been accorded wide latitude and granted appreciable power regarding the education of the young. As this Court has held, a state may "require that all children of proper age attend some school [and] that certain studies plainly essential to good citizenship . . . be taught, and that nothing be taught which is manifestly inimical to the public welfare." *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534 (1925). In this connection, school authorities may properly undertake to instill respect for democratic institutions, obedience to the law, concern for the rights of others, a love of freedom, and other "fundamental values necessary to the maintenance of a democratic political system." *Ambach* v. *Norwick*, 441 U.S., at 77; see, *e.g.*, *West Virginia St. Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 631 (1943). Although, as we shall elaborate in part II below, the state may not, consistently with the First Amendment, pursue these ends by any means it chooses, there can be little question about the legitimacy of the ends themselves.

The values that the state may permissibly seek to inculcate in the young are not, however, unlimited. Although, as we have seen, the state may seek to instill

those "fundamental values necessary to the maintenance of a democratic political system," the state may not manipulate the content of education for the purpose of indoctrinating students toward or away from particular viewpoints on matters of political or social opinion that are open to genuine controversy within our society. As this Court held in *West Virginia St. Bd. of Educ.* v. *Barnette*, 319 U.S., at 642: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . ." Put another way, "affirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the state *not* to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice." *Bellotti* v. *Baird*, 443 U.S. 622, 638 (1979) (plurality opinion, emphasis in original). The First Amendment guarantees of free inquiry, free thought, free belief, and free expression would mean little if school authorities could nip debate in the bud by imposing an ideological orthodoxy on our nation's youth. Thus, it is evident that a school board could not use the public schools to promote allegiance to a particular political party, or to instill in students a particular view on such current social or political issues as voluntary affirmative action programs, legalized abortion, or the proposed Equal Rights Amendment. Nor could it seek to imbue students with a particular opinion as to the merit of lawful social movements or as to the worth of given social or political leaders.[3]

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[3] All members of the panel below, including the dissenter, apparently accepted the basic principle described hereinabove. See 638 F.2d, at 414-417, 428, 432-437. The majority held that trial was necessary to establish whether this principle had been breached in this case. Judge Mansfield dissented, in belief that defendants had factually demonstrated that they had not been motivated by a desire to "inculcate students with any particular social or political views (e.g., legalized abortion or anti-abortion, adherence to the views of any political party or religion, promotion of the Equal Rights Amendment or the like)." *Id.*, at 428.

To deny the state authority to attempt to instill in public school students particular points of view on subjects of legitimate controversy is not to deprive the state of discretion to which it must practicably and legitimately lay claim.

> * * * To enforce those [limitations] . . . is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.
>
> The subject now before us exemplifies this principle. Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction. If it is to impose any ideological discipline, however, each party or denomination must seek to control, or failing that, to weaken the influence of the educational system. Observance of the limitations of the Constitution will not weaken government in the field appropriate for its exercise.

West Virginia St. Bd. of Educ. v. *Barnette*, 319 U.S., at 637.

Thus, control by school authorities over educational content is not without constitutional limits. The state may not shape that content based on support or disdain for particular viewpoints on issues that are the subject of legitimate debate in a democratic society. The state may sponsor only such values as are truly basic to our political and social structure. It remains to be shown that there is a genuine factual dispute with respect to whether defendants exceeded this constitutional limit. We turn next to that question.

B. The Record in this Case Presents a Triable Issue Whether the School Board's Action Constituted Impermissible Disapproval of Controversial Political or Social Viewpoints

The record in this case reflects genuine factual disputes with respect to (1) the question whether the Board's action was motivated by disapproval of certain values or opinions and (2) the question whether the values or opinions on which the Board passed judgment were among those that school authorities could properly condemn in determining educational content. Accordingly, plaintiffs should be afforded a trial on the issue whether the Board's action in this case constituted state indoctrination in impermissible subject areas.

1. *The Board's Indoctrinative Purpose*

Defendants' admissions alone furnish evidence sufficient to defeat summary judgment on the issue whether defendants' action in this case was ideologically motivated. The Board president averred in an affidavit that he was "a conservative" and "[i]t is to this that [he] attribute[d] [his] re-election on a number of occasions." Ahrens Affidavit, ¶ 2. He further declared that "[w]e are representing the community which first elected us and re-elected us and our actions have reflected its intrinsic values and desires." *Id.*, ¶ 18. The Board vice-president testified similarly that he was "basically conservative" and that his "six fellow board members feel the same way and further that this is representative of our community." Martin Affidavit, ¶ 2. And he intimated that the Board's action was undertaken to "inculcate[]" "community values [in the] student population." *Id.*, ¶ 8. Defendants stipulated that their "evaluation of the suitability of the books was based, in part, on [their] personal values, morals, [and] tastes." Defendants' Rule 9g Statement, ¶ 1(4). And, as already noted, defendants have submitted that their "conservative philosophy of morals and traditional values was the dominant factor"

motivating their action. 474 F. Supp., at 392. There is ample evidence, then, that the Board acted in this case with a purpose to influence the values that would be held by junior and senior high school students under its charge.

2. *The impermissibility of the Board's Purpose*

While defendants have acknowledged that a "conservative philosophy of morals and traditional values" underlay their action in this case, that phrase may encompass permissible subjects for state indoctrination, impermissible subjects, or both. Thus, the question remains whether any ideas and perspectives the Board sought to suppress were among those that school authorities may permissibly condemn. The record in this case contains evidence readily susceptible of the inference that the Board ventured into forbidden territory.

As we have noted, one of the works excluded as "anti-American" was *A Hero Ain't Nothing But a Sandwich*. When asked what might have been regarded as anti-American about the book, the Board president suggested that "someone might have felt [that] some of the things said . . . regarding George Washington being a slaveholder" were anti-American. Ahrens Deposition, at 89. The vice-president of the Board testified along the same lines. In fact, he read a passage from the book that he thought might be regarded by the community as offensive. The passage related a black teacher's musings to her class on George Washington:

> Only two pictures on my wall when I came here. George Washington and Abraham Lincoln. Abe was at least involved with the Civil War and the emancipation thing, but George was a slaveholder, and it is impossible to hang George over my front blackboard and not discuss him. When I discuss him, I don't go by what's in these history books or we'd be dealin' in lies. George was a slaveholder. And he had it put in his will to free alla his slaves after

> his death. But he owned a slave woman whose cookin' was so fine that he freed he[r] while he was livin'. She musta really known how to barbeque.

Martin Deposition, at 21-22. These facts are susceptible of an inference that the Board acted with a purpose to conceal a particular historical perspective on an issue of social importance. Were that the case, the Board's inculcative efforts could not be justified as within the ambit of the state's legitimate concerns. Whatever the bounds of the First Amendment proscription, at the least the First Amendment does not permit state promulgation of revisionist histories nor official inculcation of a distorted view of the roots of current and pressing social problems.

Similarly, there are indications that *A Reader for Writers* was excluded from the libraries and curricula because it "equate[d] Malcolm X[,] considered by many to be a traitor to this country, with the founding fathers of our country." Ahrens Affidavit, A-1.[4] In this instance, too, the Board may have acted unconstitutionally. It is far from evident how resolution of competing views regarding the appropriate stature of Malcolm X is consistent with the First Amendment, and thus the legitimate business of public school authorities.

At the least, these instances permit the inference that the Board was acting with purposes that are forbidden to the state by the First Amendment. On this record, then, plaintiffs are entitled to a trial of their claims against defendants.

II. LIMITATIONS ON INDOCTRINATIVE METHODS

A. The Constitutional Principle

In part I, we contended that the Board in this case may well have ventured outside the area of its proper concern by undertaking to foster values other than those—

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[4] See *supra*, note 2.

and perhaps antithetical to those—that are basic to our democratic tenets. Our argument was directed, then, at the subjects of Board indoctrination. In this section, we maintain that, even on those subjects where the state is free to indoctrinate, the Constitution limits the methods of permissible indoctrination.

We do not contend that the First Amendment limits the state's ability to select or exclude materials based on, for example, readability, thoroughness of treatment, intellectual coherence, or amenability to teaching, or on such practical considerations as budgetary constraints, availability of materials, or time limitations. But we do contend that the state abuses its authority when, absent compelling reasons,[5] the state, for the very purpose of insulating students from political or social views disfavored by the state, acts to suppress such views.

School authorities have available to them a variety of constitutionally acceptable means of transmitting those values that are the subject of permissible state indoctrination, described in part I, *supra*. Notably, such values may be transmitted by processes of reason, explanation, example, emphasis, and rebuttal. Thus, as this Court has observed, a state may require "instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty," and thus "inspire patriotism and love of country." *West Virginia St. Bd. of Educ.* v. *Barnette*, 319 U.S., at 631, quoting *Minersville School Dist.* v. *Gobitis*, 310 U.S. 586, 604 (1940) (dissenting opinion). Through "present[ation] and expl[anation] [of] subject matter in a way that is both comprehensible and inspiring," and through teacher "example," a public school may legitimately "influence the attitudes of students toward government, the political process, and a citizen's social responsibilities." *Ambach* v. *Norwick*, 441 U.S., at 78-79.[6]

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[5] See note 10, *infra*.

[6] As explained in part I, the state is not free to place its weight on one side of matters of political or social controversy—even by

The methods available to the state to achieve its indoctrinative aims, however, are not without constitutional limits. A school board may *not*, absent compelling reasons,[7] inculcate particular views by purposefully suppressing significant facts or opinions conveying or supporting competing views. For example, while the state may permissibly teach respect for the American flag, it could not do so by excluding books from the public school libraries *for the reason that* such books mention the instances in our history when flags have been burned in political protest.[8] Cf. *West Virginia St. Bd. of Educ.* v. *Barnette*, *supra*; *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). And, assuming arguendo that the state could permissibly instill a favorable point of view about a particular American president, it could not do so by excluding books from school libraries and curricula for the reason that such books mention flaws in that president's conduct. Cf. pp. 9-10, *supra*. That mode of inculcation, however expedient, is repugnant to First Amendment values. As this Court has explained, "[i]n our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. . . . In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."

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means of emphasis or persuasion—but may take a position only with respect to those "fundamental values necessary to the maintenance of a democratic political system."

[7] See note 10, *infra*.

[8] We emphasize "for the reason that" to make clear the limits of the proposition we assert. We are not contending that the absence of "flag burning" books from the library or curriculum of a school that teaches respect for the flag would, without more, raise any constitutional problem. The state has no affirmative obligation to stock school libraries with books containing competing views on every issue. Our argument is simply that state decisions regarding educational content cannot be motivated by a desire to keep students in the dark about matters competing with state-sponsored views.

Tinker v. *Des Moines Indep. Comm. School Dist.*, 393 U.S. 503, 511 (1969). Put another way, the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the 'marketplace of ideas.'" *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967).

Moreover, ideas and values that a school board might permissibly attempt to promote should hold their own in the marketplace of ideas. Indeed, "teaching" by intentionally closing off sources of competing views may be utterly self-defeating, for it is manifestly inconsistent with the democratic values it is presumably intended to instill and fails adequately to prepare students for effective participation in a free, open, and diverse society. "Schools must play a central role in preparing their students to think and analyze and to recognize the demagogue." *James* v. *Board of Education*, 461 F.2d 566, 574 (2d Cir.), cert. denied, 409 U.S. 1042 (1972). And when school authorities act to suppress disfavored ideas, there is a "danger that the school, by power of example, would appear to the students to be sanctioning the very 'pall of orthodoxy,' condemned in *Keyishian*, which chokes freedom of dissent." *Ibid.* As this Court has held:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

West Virginia St. Bd. of Educ. v. *Barnette*, 319 U.S., at 637.

B. The Record in this Case Presents a Triable Issue Whether the School Board Employed Constitutionally Proscribed Methods to Achieve Its Indoctrinative Ends

The Board's action in this case—removal of selected library books—necessarily insulated students from the content of the excluded materials.[9] Whether that action violated constitutional restrictions on indoctrinative methods turns on whether the books in question were excluded on ideological grounds and, if so, whether the exclusion was warranted by some compelling reason. Defendants are entitled to summary judgment on neither of these issues.

As we have shown, the record strongly suggests that defendants' action in excluding the books was ideologically motivated. See pp. 8-10, *supra*. And, at this juncture, defendants have proffered no compelling justification for imposing the restrictions in question.[10] Thus, the issue

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[9] Petitioners in their brief make much of the fact that the Board did not directly prohibit teachers from discussing the disputed books or the ideas and positions they represent. Petitioners Brief, at 4, 39-40. Although no such prohibition was expressly announced, a full evidentiary trial may confirm the inference that students and teachers would be loathe to discuss books—and the ideas they contain—that the Board singled out for exclusion from the curriculum. A trial may further establish that defendants intended to achieve this forseeable result. See majority opinions below, 638 F.2d at 418 n. 13, 437 n. 8. In any event, it is clear that by removing the books from the school library and proscribing use of the books in the school curriculum, the Board sought to insulate students from what could be fully discerned only by reading these materials. For example, upon reading the passage about George Washington quoted *supra*, at pp. 9-10, one gains certain perceptions that may not be derived from a discussion about the book. This distinction is readily apparent to anyone who has ever read a book.

[10] For an example of a possible "compelling reason", the maturity level of students in particular grades may be such that overly complex and sophisticated concepts may be excluded not-

whether defendants exceeded the First Amendment limit on indoctrinative methods must proceed to trial.

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withstanding that they rebut the state-favored view. Relatedly, certain materials may be thought too inflammatory or shocking for students of particular ages. It is important to appreciate, however, that, although a school board's judgment in this regard is entitled to some respect, it cannot be dispositive when First Amendment rights are at stake. Rather, a reviewing court must undertake its own rigorous inquiry. Courts "cannot, because of modest estimates of [their] competence in such specialities as public education, withhold the judgment that history authenticates as the [judicial] function . . . when liberty is infringed." *West Virginia St. Bd. of Educ.* v. *Barnette*, 319 U.S., at 640.

Although defendants have not argued that any politically motivated exclusions in which they engaged were undertaken for compelling reasons, they have contended that the exclusions in this case were motivated by disapproval of sexually explicit passages and coarse language contained in the books. This contention has relevance as a defense to the claim that defendants' action was ideologically motivated. As our discussion has shown, at pp. 8-10 *supra*, the issue whether or not defendants' action was ideologically motivated is not ripe for summary judgment.

CONCLUSION

The Court of Appeals in this case properly reversed the District Court's Order granting defendants' motion for summary judgment. As we have established in part I, there is evidence in the record that could support a finding that the Board acted to sustain or disapprove views that were not permissible subjects for state indoctrination. And as we have demonstrated in part II, regardless of the legitimacy of the Board's ends, there is evidence that would support a finding that "the means adopted . . . exceed the limitations upon the power of the state." *Meyer* v. *Nebraska*, 262 U.S., at 402. For these reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Office - Supreme Court, U.S.
FILED
DEC 28 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2043

IN THE

Supreme Court of the United States

October Term, 1981

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT, *et al.*,
Petitioners,

against

STEVEN A. PICO, by his next friend FRANCES PICO, *et al.*,
Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief of New York State United Teachers, *Amicus Curiae*

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Christina Fasulo;
Patrick Hughes;
Richard Melchers;
Richard Michaels;
Louis Nessim

B. RESPONDENTS

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Jacqueline Gold, by her next friend, Rona Gold;
Russell Rieger, by his next friend, Samuel Rieger;
Glenn Yarris, by his next friend, Richard Yarris;
Paul Sochinski, by his next friend, Henry Sochinski

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief of New York State United Teachers, *Amicus Curiae.*

Statement of Interest.

New York State United Teachers (NYSUT) is a federation of more than 450 local teacher unions and associations with a total membership of over 188,000 educators, librarians, and other professional and school-related personnel. The New York State affiliate of the American Federation of Teachers, AFL-CIO, NYSUT is presently

the largest single state-wide teacher labor organization in the country. Included among local teacher unions affiliated with NYSUT is the United Teachers of Island Trees, the collective bargaining representative of the teachers and librarians employed by the petitioner Board of Education of the Island Trees Union Free School District.

NYSUT believes it incumbent upon itself to place before this Court the views of its membership because at issue in this case is nothing less than the role of education in a free society. If the purpose of public education—and the task of teachers—is, as Mr. Justice Frankfurter said, "to foster those habits of open-mindedness and critical inquiry which alone makes for responsible citizens," *Wieman v. Updegraff,* 344 U.S. 183, 196 (1952), the conditions in our nation's schools must be such as will support and nourish that goal. The actions of the petitioner public officials in removing nine books from secondary school libraries and from use in the curriculum and prohibiting their assignment as required, optional or even suggested reading, destroyed the atmosphere of open inquiry in the Island Trees public schools. NYSUT appears as *amicus curiae* herein to urge that the first amendment forbids public officials from closing the "marketplace of ideas," *Healy v. James,* 408 U.S. 169, 180 (1972), and rendering the academic freedom of its professional teacher and librarian members subservient to political caprice and questionable assessments of community standards.

Summary of Argument.

In 1975, after attending a conservative political conference, petitioners undertook a course of action which led to the removal of nine books from the district's libraries and prohibition of their use in the curriculum. At no point

in the process did the petitioners seek meaningful input regarding the educational soundness of their proposed course of action from their teachers and librarians. Indeed, the evidence overwhelmingly suggests that educational considerations played no part in their decision.

The petitioners' interdict sweeps broadly: teachers in Island Trees are forbidden to assign the nine books as required, optional or even suggested reading. In addition, in the absence of a coherent and specific rationale for the petitioners' decision, teachers and librarians are without guidance as to how to proceed in the future. NYSUT's view is that the petitioners' actions, in the circumstances presented, violated the Island Trees teachers' and librarians' first amendment rights of free speech and academic freedom.

President's Council District 25 v. Community School Board No. 25, 457 F.2d 289 (2nd Cir. 1972), *cert. denied,* 409 U.S. 998 (1972), which did not deal with the blanket restrictions involved herein or the issue of political motivation, does not control the facts of this case. In any event, *President's Council* does not stand for the proposition that local officials have an absolute right to remove any books from the library without concern for the first amendment. The facts in *Minarcini v. Strongsville City School District,* 541 F.2d 566 (6th Cir. 1976), more closely parallel those present herein. Moreover, the decision of the court in *Minarcini* reflects a careful balancing of the respective interests of government officials on one hand, and education professionals and students on the other, in this sensitive area.

NYSUT requests that the Court provide guidance as to procedures for book selection and removal which properly reflect the constitutional interests of all parties to the

education process. NYSUT requests that an appropriate review process should involve teachers and librarians and that the decision as to selection or removal of reading material should be based on the value of the material as an instrument of educational development. Further, intrusion of the individual moral, religious or political views of the reviewers and anyone else involved in the decision making process should be proscribed. A review process properly established and documented should minimize, if not eliminate the necessity for judicial involvement.

ARGUMENT.

In the circumstances presented, the school board's actions in banning library books and prohibiting their use in the curriculum violated the First Amendment rights of the District's teachers and librarians to free speech and academic freedom.

(A)

In *Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969), this Court reiterated the long standing federal constitutional principle that first amendment rights are available to teachers and students. Teachers do not shed their constitutional rights to freedom of speech or expression when they enter the classroom. Moreover, academic freedom, the preservation of the classroom as a "marketplace of ideas," is one of the safeguarded rights of the first amendment. *Healy v. James, supra,* at 180-81 (1972).

Federal appellate courts have also had occasion to rule upon the application of the first amendment in the public school setting. In *Keefe v. Geanakos*, 418 F.2d 359, 361

(1969), the United States Court of Appeals for the First Circuit was presented with the question as to whether a teacher could be disciplined for assigning to his senior high school English class and discussing in the classroom an article from Atlantic Monthly magazine containing a "highly offensive" word. After a thoughtful discussion of the context in which the word was used in the article and the teacher's treatment of the word in classroom discussion, the court upheld the teacher's qualified right to use a particular teaching method. Chief Judge Aldrich, writing for the court opined:

> If * * * the students [high school seniors] must be protected from such exposure, we would fear for their future. We do not question the good faith of defendants in believing that some parents have been offended. With the greatest of respect to such parents, their sensibilities are not the full measure of what is proper education.

Id. at 361-362.

Two years later in *Mailloux v. Kiley,* 323 F.Supp. 1387, 1390, *aff'd* (1971) 448 F.2d 1242 (1st Cir. 1971),[1] the same

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[1]Petitioners' brief quotes *Mailloux v. Kiley, supra* at 192, selectively and out of context for the proposition that teacher control of curriculum is at variance with the major function of public education [Petitioners' Brief at 20]. The court in *Mailloux* balanced the respective rights and interests of teachers and elected officials. With respect to the role of academic freedom in secondary education, the Court stated:

> In support of a qualified right of a teacher, even at the secondary level, to use a teaching method which is relevant and in the opinion of experts of significant standing has a serious educational purpose is the central rationale of academic freedom. The Constitution recognizes that

(Continued on following page)

court affirmed a decision by the United States District Court for the District of Massachusetts holding that:

> [a] public school teacher has not only a civic right to freedom of speech both outside (*Pickering v. Board of Education*, 391 U.S. 563 (1968) and inside (See, *Tinker v. Des Moines Independent Community School District, supra* at 506) the schoolhouse, but also some measure of academic freedom as to his in-classroom teaching. *Keefe v. Geanakos, supra; Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970).

(Footnote continued)

> freedom in order to foster open minds, creative imaginations, and adventurous spirits. Our national belief is that the heterodox as well as the orthodox are a source of individual and of social growth. We do not confine academic freedom to conventional teachers or to those who can get a majority vote from their colleagues. Our faith is that the teacher's freedom to choose among options in which there is any substantial support will increase his intellectual vitality and his moral strength. The teacher whose responsibility has been nourished by independence, enterprise, and free choice becomes for his students a better model of the democratic citizen. His examples of applying and adapting the values of the old order to the demands and opportunities of a constantly changing world are among the most important lessons he gives to youth.
>
> Choice of teaching methods rather than supplementary reading material selection was at issue in *Mailloux*. The conclusion of the court was that unless the state can prove that a teacher was put on notice not to use a particular method, the teacher is protected in using any method that is relevant to his subject and students, is regarded by experts as serving a serious educational purpose and is used in good faith. Moreover, the court held that the protection accorded to teachers in choosing a teaching method derives not from the teacher's status as a public employee, but because "in his teaching capacity he is engaged in the exercise of what may plausibly be considered vital first amendment rights." [Cite omitted] *Id.*

Although the federal judiciary will attempt to avoid involving itself in the daily operations of local schools,[2] it has never hesitated to intervene where local school officials have, by arbitrary or improper actions, transgressed the constitutional rights of teachers and students. This has been no more evident than in the area of first amendment guarantees. The safeguards of the first amendment will quickly be brought into play to protect the right of academic freedom because any unwarranted invasion of this right will tend to have a chilling effect on the exercise of the right by other teachers as well. *Cf. Wieman v. Updegraff, supra* at 194-95 (1952) (Frankfurter, J., concurring); *Pickering v. Board of Education, supra; Parducci v. Rutland, supra.*

At issue in the instant case is the petitioner school board's removal of nine books from the district's school libraries and prohibition of their use in the curriculum. While the petitioner is delegated responsibility under New York State *Education Law* for selecting textbooks[3] to be used in the schools, it may not exercise its authority in a manner that is arbitrary, capricious, improper or violative of the constitutional rights of teachers or students. *Epperson v. Arkansas,* 393 U.S. 97, 107 (1968); *Keyishian v. Board of Regents,* 385 U.S. 589 (1967). It is submitted that the actions of the school board members at issue herein, taken without any effort to obtain meaningful professional input with respect to educational soundness, were manifestly arbitrary and improper. Moreover, analysis of

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[2]It should be noted that federal involvement in the instant case was invited by petitioner. Respondents' verified complaint, which raised state as well as federal constitutional claims, was filed in New York State Supreme Court. Petitioner removed the action to federal court.

[3]No issue is presented herein with respect to the school board's authority to select textbooks. All of the books involved herein were library books or supplemental reading materials.

the content of the regulation together with the circumstances in which it was enacted compels a finding that the regulation was adopted in blatant disregard of the Island Trees public school teachers' and librarians' first amendment rights of free speech and academic freedom. *Minarcini v. Strongsville City School District,* 541 F.2d 577 (6th Cir. 1976); *Salvail v. Nashua Board of Education,* 469 F.Supp. 1269 (D.N.H. 1979); *Right to Read Defense Committee of Chelsea v. School Committee of the City of Chelsea,* 454 F.Supp. 703 (D. Mass. 1978).

The process by which nine books were removed from the libraries and classrooms of the Island Trees schools was appropriately described by Judge Sifton as "erratic and free-wheeling." *Pico v. Board of Education, Island Trees Union Free School District,* 638 F.2d 404, 416 (2nd Cir. 1980). The factors supporing Judge Sifton's conclusion included the initiation of the book removal process by board members; the source and limited extent of the board's information concerning the books removed; the delay of nearly two months between receipt of the objectionable book list and commencement of the removal process; the board's disregard of the advice and counsel of its superintendent and failure to follow established procedures; the appointment of a committee and subsequent failure to follow its recommendations; the politicizing of the book removal issue in the school board election campaign and the conduct of a public opinion poll concerning the popularity of the board's actions.[4]

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[4]The school board's course of conduct herein contrasts sharply with the policies and procedures recommended by the Regents of the University of the State of New York in later published *Selection Guidelines.* Moreover, NYSUT points out that although the *Selection Guidelines* were not available in November, 1975 when the book removal issue first surfaced in Island Trees, several alternative sources of guidance were available including guidelines issued by the American Association for School Librarians, American Association of School Administrators and National Council of Teachers of English. These sources are in fact referred to in the *Selection Guidelines.* Accordingly, had the board made appropriate and timely use of its professional personnel a responsibility method of proceeding in this sensitive area could have been devised and this entire controversy avoided.

NYSUT would augment the foregoing list with two additional procedural irregularities: the school board's failure to consult with professional personnel concerning the removal decision and abandonment of a commitment to academic freedom set forth in the collective bargaining agreement.[5] Numerous questions could and should have been addressed to teachers and librarians at every stage of the removal investigation. Moreover, is it reasonable to consider the content of a book used in the curriculum separate and apart from an experienced teacher's treatment of the material in classroom discussion? *See, Keefe v. Geanakos, supra; Mailloux v. Kiley, supra.* Who, in fact, was in a better position than the teachers and librarians in the Island Trees school system to make meaningful input with respect to the educational merit of reading materials and their suitability for the Island Trees student population?[6] *See, Keefe v. Geanakos, supra.*

[5]Article XIX of the collective bargaining agreement between the Island Trees Board of Education and the United Teachers of Island Trees, provides:

> The District's educational program is keyed to the preparation of students for intelligent and meaningful participation in a democratic society. The Board and the U.T.I.T. agree that academic freedom is essential to fulfillment of this purpose.
>
> Accordingly, it is agreed that teachers shall have the right to introduce and explore controversial material, provided only that the material and the manner in which it is presented are in good taste, appropriate to the grade level, and relevant to course content. Every effort will be made to present all sides of controversial issues.
>
> Is is understood that any topic not included in the curriculum approved by the Board of Education will not be taught. Knowledge of Board approved course content is the responsibility of each staff member.

[6]It is indeed ironic that the same school board members who removed books from their local school shelves based on an anonymous list of objectionable books supplied at a political conference now suggest that the professional personnel who they have employed—many of whom have held their jobs for over a decade—are not capable of judging the suitability of materials for their children because of their non-residence in the district's borders [Petitioners' Brief at 19].

NYSUT suggests that the Island Trees school board would have sought the advice of professional personnel had educational considerations been the touchstone of the board's inquiry. Unfortunately, the facts indicate otherwise: the board members chose to rest their removal decision on their own moral, political and religious beliefs and precious little else.[7]

With this background, consideration of the scope and rationale for the removal of the nine books is appropriate. It is significant that the nine books were removed not only from the junior and senior high school libraries,[8] but from use in the curriculum as well. Moreover, although the President of the school board states in his affidavit that neither he nor any member of his administration directed the staff not to discuss the banned volumes or the ideas contained or expressed therein, the district court determined that "for use in the curriculum" had been explained by the same official as a proscription against assignment of the books for required, optional or even suggested reading.

Numerous reasons for the removal of the nine books are suggested in the affidavits of board members and in the resolutions and press releases which accompanied the board's actions. The terminology employed is, in large

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[7]Petitioners profess to speak the voice of their community, yet at least 41% of the district residents who responded to petitioners' questionnaire expressed disagreement with petitioners' position on the book removal issue. Even assuming the reliability of petitioners' methods, NYSUT suggests that nine percent margin is not the "breathing room" contemplated by the framers of the first amendment or the federal courts. *James v. Board of Education*, 461 F.2d 566, 572 (2nd Cir.), *cert. denied*, 409 U.S. 1042 (1972).

[8]The board resolutions stated that the books were removed from elementary and high school libraries. However, only one of the eleven books, *A Reader for Writers*, was found in the junior high school and none were found in the elementary schools.

part, vague and general and the objections, with few exceptions, are not co-identified with particular books. No matter how carefully one reads the volume of materials where opinions are expressed, one is at a loss to discern any guiding principles. Certainly it is too late to suggest that what is "filthy" for one generation is necessarily so for another or that the term "anti-American" carries with it any universal truth.

Acknowledging the difficulty of proceeding in this area, can it be said that the teachers and librarians in the Island Trees public schools presently enjoy "the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma?" *Wieman v. Updegraff, supra,* at 196 (Frankfurter, J., concurring). We are certain that Judge Sifton would answer in the negative. In a strongly worded opinion, Judge Sifton stated:

> The very nature of this broad brush approach must inevitably be to suggest that the school officials' concern is less to cleanse the libraries of all books containing material insulting to members of one or another religious group or which evidences an inaccurate view of the nation's history, than it is to express an official policy with regard to God and country of uncertain and indefinite content which is to be ignored by pupils, libraries and teachers at their peril.

Pico v. Board of Education, Island Trees Union Free School District, supra at 416. We agree. But as an association of professional educators, we are particularly disturbed by the impact of the board's actions on the academic freedom of Island Trees teachers and librarians.

NYSUT believes that the content of a book and its manner of expression cannot be subjected to entirely separate analyses. As Judge Newman observed, "ideas and the language used to express them are always related." *Id.* at 438. Thus the significance of the removal of nine books is far greater than the cumulative number of pages would suggest.

Among other things, we perceive that the ideas raised in the nine books will be discussed in the classroom with great reluctance, if at all. Island Trees teachers will think twice when writing their lesson plans: not only will they reconsider their choice of materials but the topics covered and treatment of various subjects as well. With relevance succumbing to fear, curriculum changes simply will not be proposed. Librarians will try to second guess the moral, political and religious persuasions of board members before making recommendations.[9] Moreover, neither teachers nor librarians will quickly forget the personal at-

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[9]Judge Sifton adequately assessed the precarious conditions under which the Island Trees teachers and librarians must now work:

> [T]he Board's erratic and free-wheeling procedures inevitably leave it a matter of guesswork for teachers, librarians and students in the District whether other efforts at self-expression on their part will be curtailed with equally little notice and equally little opportunity for defense in the name of policies having equally little to do with the local concerns of the educational community, subject to the equally uncertain outcome of public debate.

Pico v. Board of Education, Island Trees Union Free School District, 638 F.2d at 417.

tack launched by board members against their union president when he dared to speak out against censorship on their behalf.[10]

Mr. Justice Frankfurter, in his concurring opinion in *Wieman v. Updegraff, supra,* spoke with eloquence and conviction about the purpose of education and the role of educators in a democratic society:

> That our democracy ultimately rests on public opinion is a platitude of speech but not a commonplace of action. Public opinion is the ultimate reliance of our society only if it can be disciplined and responsible. It can be disciplined and responsible only if habits of open-minded and critical inquiry are acquired in the formative years of our citizens. The process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards.
>
> To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of openmindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an

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[10]In the *Newsletter* issued to rebut newspaper stories alleged to contain "lies and misinformation * * * spread by the teachers' union, the board stated:

> Mr. Compare [union president] is fighting to keep books in our schools which are offensive to Christians, Jews, Blacks and all Americans in general. One such book [apparently referring to Vonnegut's *Slaughterhouse Five*] refers to Jesus Christ as a "man with no connections." One must ask oneself what motivates this man? * * * Why does Mr. Compare insist that these books remain in the hands of our children?

> enlightened and effective public opinion. * * * They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them.

Our objection, then, is not with the conservation of the board members' point of view, but rather with the foreclosure of the opportunity for teachers and students alike to consider, to question and to discuss different perspectives.

The Island Trees Board of Education is an instrument of the State. As this court declared in *Epperson v. Arkansas, supra,* invalidating an Arkansas statute which prohibited the teaching of evolution in public schools, "It is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees." In the case at bar, the petitioner school board removed nine books—books which had already been part of the schools' libraries—as supplemental reading material or as part of the course material to be taught. It did so solely on the basis of the moral, religious and political views of individual board members and without any regard for the judgment of experienced educators or the educational merit of the materials in question. NYSUT submits that the board's actions are wholly improper under federal constitutional standards, *Epperson v. Arkansas, supra; Keyishian v. Board of Regents, supra; Minarcini v. Strongsville City School District, supra; Salvail v. Nashua Board of Eduction, supra; Right to Read Defense Committee of Chelsea v. School Committee of the City of Chelsea, supra.*

(B)

Two circuit court decisions, *President's Council, District 25 v. Community School Board No. 25*, 457 F.2d 289 (2nd Cir. 1972), *cert. denied*, 409 U.S. 998 (1972), and *Minarcini v. Strongsville City School District, supra*, require careful analysis in this case. The district court held that the Second Circuit's decision in *President's Council* controlled the facts of the instant case. *Pico v. Board of Education, Island Trees Union Free School District*, 474 F.Supp. 387, 394 (E.D.N.Y. 1979). Dissenting from his colleagues, Judge Mansfield agreed. 638 F.2d at 419. We believe that *President's Council* is not applicable to the facts presented herein. Moreover, in our view, Minarcini, which directly addresses the issue of political motivation involved in this case, is both relevant and persuasive.

In *President's Council*, a coalition of parents, teachers, administrators, librarians and students challenged the local school board's decision to remove from the junior high school libraries in the school district all copies of *Down These Mean Streets* by Piri Thomas, one of the books at issue in the case at bar. It should be noted, however, that the school board in that case modified its action prior to the commencement of the federal suit by permitting the book to be retained in those school libraries which had previously carried the book and by making the book available on a direct loan basis to any parent who requested it for his child. In addition, teachers were not prohibited from assigning the book or using it in the cirriculum. In affirming the district court's dismissal of the complaint, the Second Circuit held that the removal of the book in that situation did not infringe upon any constitutional rights.

Although we believe that the court erred in its ultimate determination, it must be pointed out that there are significant differences between the facts in *President's Council* and the case at bar which take the case at bar out of the reach of the holding in *President's Council.* First, the subject book in *President's Council* was still available from the school libraries on a direct loan basis to the parents for their children.[11] Second, the school board's action in *President's Council* was limited to junior high school students. Last, and perhaps most importantly, the teachers in *President's Council* were not precluded from discussing, assigning or merely suggesting the book as is the case in Island Trees. A teacher or librarian in *President's Council* could not face possible disciplinary or punitive action for employing the book in his curriculum as he could in this case.

These factors were recognized as critical to the court's decision in *President's Council:*

> A book has been removed but the libarian has not been penalized, and the teacher is still free to discuss the Barrio and its problems in the classroom. The action of the Board does not even preclude the teacher from assigning it for outside reading. In those libraries which have the book the parent can borrow it and, if he sees fit, can loan it to his child if he wishes to read it. *The intrusion of*

[11]The school board president's observation herein that the books at issue are available at the public libraries is of no comfort to the respondent or to the teachers and librarians in Island Trees. Restraint on expression may not be justified by the fact that there may be other times, places or circumstances available for such expression. *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 556 (1975); *Spence v. Washington,* 418 U.S. 405, 411, n.4 (1974); *Schneider v. State,* 308 U.S. 147, 163 (1939); *Minarcini, supra,* at 582; *Salvail, supra,* at 1275.

> *the Board here upon any first amendment constitutional right of any category of plaintiffs is not only not "sharp" or "direct" but is miniscule.* (Emphasis supplied.)

457 F.2d at 292.

The district court itself recognized the differences between the intrusion found in *President's Council* and this case in its memorandum decision of August 15, 1977, on the plaintiffs' motion to remand:

> Moreover, the "miniscule" first intrusion found in *President's Council* may well be substantially exceeded in this case because of the curriculum restrictions alleged here as well as the "political" standards allegedly applied in the evaluation of books. [cite omitted] Unlike *President's Council,* here a teacher in the Island Trees district may be precluded by the Board's action from discussing or assigning as outside reading any of the eleven subject books.

Slip opinion pages 3-4. Thus, we have absent from the *President's Council* case any realistic claim of academic freedom and free speech violations resulting from the board's actions therein. The constitutional transgressions in this case are of a much greater magnitude.

In *Minarcini,* the District Court for the Northern District of Ohio was faced with a class action challenge, on first and fourteenth amendment grounds, to the Strongsville Board of Education's selection of textbooks, refusal to accept the textbook and curriculum recommendations of the faculty, removal of two books (Kurt Vonnegut's *Cat's Cradle* and Joseph Heller's *Catch 22*) from

the school library, and order prohibiting teachers and students from discussing such books in class or using them as supplemental reading material. For purposes of our discussion, only the last two issues are germane. The district court found that the Board had not violated any first or fourteenth amendment rights on any of the issues and dismissed the complaint. The court of appeals affirmed on the textbook selection and curriculum issues but reversed on the library, class discussion and supplemental reading issues. The court held that it was unconstitutional for the school board to remove books from the library and prohibit their use and discussion in class or as supplemental reading materials because individual board members found them distasteful or morally repugnant.

In declaring the applicable school board resolutions null and void the Sixth Circuit held:

> Neither the State of Ohio nor the Strongsville School Board was under any federal constitutional compulsion to provide a library for the Strongsville High School or to choose any particular books. Once having created such a privilege for the benefit of its students, however, neither body could place conditions on the use of the library which were related solely to the social or political tastes of school board members.

541 F.2d at 582. The court found that the board's action in removing the books in question from the school libraries and prohibiting their use in the curriculum was violative of the students' right of free speech as well as their first amendment right to know.[12] Reasoning that the invalidation of the school board's resolutions on the basis of the students' first amendment claims would provide an adequate remedy for the teachers, the *Minarcini* court did not

come to grips with the teachers' and librarians' academic freedom claim. The court did recognize, however, that the school board's resolutions would have a chilling effect on classroom discussion. *Id.* at 584.

(C)

Recent decisions in the District of Massachusetts and the District of New Hampshire on the issue at bar have followed the reasoning of the Sixth Circuit in *Minarcini.* Although rejected by the district court which felt bound by the Second Circuit's decision on *President's Council* and disregarded by Judge Mansfield in his dissent, we feel that discussion of these cases is timely and appropriate.

In *Right to Read Defense Committee of Chelsea v. School Committee of the City of Chelsea, supra,* the issue presented was whether the defendant's decision to bar an anthology of adolescent writings from the high school library would be allowed to stand. The plaintiff's position, which was virtually identical to that of the students herein, was that the School Committee's action violated the first amendment rights of students, faculty and library staff. The School Committee defended by claiming that it had unconstrained authority to remove books from the shelves of the school library based on various state statutes under which it was delegated general responsibility for the public schools in its jurisdiction. It also contended like the school board in *Minarcini,* that since it was not required to purchase the subject anthology for the library, it could remove it at will. In an opinion by Tauro, J., the court held that while "local authorities are, and must continue to be, the principal policy makers in the public schools,"

[11]For the more recently recognized first amendment right to know see *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Kleindienst v. Mandel*, 408 U.S. 753 (1972); and *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1972).

the School Committee's actions in removing the book did not serve a substantial governmental interest and constituted an infringement on first amendment rights of students and faculty. *Right to Read Defense Committee of Chelsea v. Committee of the City of Chelsea, supra,* at 710-11.

The court dealt the School Committee's claim of an absolute right to remove the anthology from the shelves of the school library a summary blow:

> It has no such right, and compelling policy considerations argue against any public authority having such an unreviewable power of censorship. There is more at issue here than the poem *City*. If this work may be removed by a committee hostile to its language and theme, then the precedent is set for removal of any other work. The prospect of successive school committees "sanitizing" the school library of views divergent from their own is alarming, whether they do it by book or one page at a time.

Id. at 714. Preservation of an unlimited marketplace of ideas rather than censorship should be the goal of local authorities. *See Red Lion Broadcasting Co. v. Federal Communications Commission,* 395 U.S. 367 (1969) and *Tinker v. Des Moines School District, supra.* The Court concluded with a stirring reminder which is unquestionably appropriate to the facts at bar:

> The most effective antidote to the poison of mindless orthodoxy is ready access to a broad sweep of ideas and philosophies. There is no danger in such exposure. The danger is in mind control.

Right to Read Defense Committee of Chelsea v. School Committee of Chelsea, supra, at 715.

The factual context and holding in *Salvail v. Nashua Board of Education, supra,* is similar. In *Salvail,* the plaintiffs raised a constitutional challenge to the school board's decision to remove *Ms.* magazine from the school library. Objections to the magazine, which were raised by a board member who held strong religious and patriotic views, focused on advertisements in the magazine of political and sexual nature. Echoing *Minarcini,* and *Right to Read,* the court held that the defendants had failed to demonstrate a substantial and legitimate governmental interest sufficient to warrant the removal of *Ms.* magazine from the Nashua High School library. *Salvail v. Nashua Board of Education, supra,* at 1275.

Like *Minarcini* and *Right to Read,* the court found that the school board, while not constitutionally obligated to establish a library or place any materials on its shelves, once having done so, could not limit the privilege based solely on the political or social tastes of its membership. The school board in *Salvail,* like the school board herein, contended that the students remained free to purchase or borrow the magazine from other sources. But this justification was dismissed by the Court on the authority of *Minarcini* and cases cited therein.

Finally, the *Salvail* court considered the impact of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra,* where this Court struck down a statute proscribing licensed pharmacists from advertising the price of prescription drugs. The significance of *Virginia State Board of Pharmacy* in *Salvail* and in the instant case, lies in the Court's firm recognition of the fundamental two-way character of protected communication:

> Freedom of speech presupposes a willing speaker. But where a speaker exists, * * * the protection afforded is to the communication, to its source and its recipients both. This is clear from decided cases.

Salvail v. Nashua Board of Education, supra, at 1274, citing *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra,* at 756. Citing favorably a passage from a law review note, the court in *Salvail* implicitly found that "the library of a public high school is a 'forum for silent speech' with communication evidenced by the presence of a source (books) and a recipient (student-reader)." Note, First Amendment Limitations on the Power of School Boards to Select and Remove High School Text and Library Books, 52 St. John's L.R. 457, 471 (1978).

Certain other important comparisons must be drawn between *Right to Read* and *Salvail* and the case at bar. The plaintiffs in both cases include teachers. *Right to Read* in particular focuses on the pressures that are placed on teachers and librarians when they defend the often unpopular position that the "sensibilities [of parents or local officials] are not the full measure of what is proper education." *Keefe v. Geanakos, supra,* at 361-62.

In *Right to Read* a board member requested the superintendent to determine if the librarian had knowingly put "trash" in the library so that the board could make a determination as to whether the librarian was "the type of person we want to continue in that position." 454 F. Supp. at 708. At a subsequent meeting the same board member moved that consideration be given to transferring the librarian to a classroom position because of her "mistake" in selecting the book. After the librarian spoke

out and joined with students, parents and teachers in instituting the litigation the board member was quoted in a local newspaper as stating "Who needs employees like that? Who needs employees that will fight to keep the kind of tasteless, filthy trash that is contained in the poem we voted to remove?" A day later, again in the local newspaper, the same board member suggested that the board may seek to reassign the librarian or to obtain resignations from the teachers who had taken legal action. *Id.* at 709. The obvious intent and consequence of such actions by elected local officials is to chill all but the most stalwart in the exercise of their first amendment rights. Indeed, the facts of this case show that the local union president was vilified by the petitioners in a community newspaper when he took personal responsibility for urging the position of his membership against censorship.

Secondly, the restrictions in the instant case which prohibit use in the curriculum as well as use in the library, sweep more broadly than the restrictions in *Right to Read* or *Salvail*, which relate only to the library. In his deposition, the president of the board took the position that the nine books which were banned should not be assigned as required, optional or even suggested reading. Although the board president conceded that the book might still be discussed in class, we are at a loss to determine how a teacher could raise the subject within the parameters of the board's ruling without risking disciplinary action for insubordination. Thus, the restriction at hand goes directly to the teacher and the classroom where the others do not.

Thirdly, both cases recognize that not every book removal raises questions of a constitutional magnitude. In *Right to Read* the court agreed with the Second Circuit's statement in *President's Council* that obsolescense, irrelevance, improper selection in the first instance (such as

failure to comply with reasonable regulations governing acquisitions), obscenity, and architectural necessity were appropriate considerations. *Right to Read Defense Committee of Chelsea v. School Committee of Chelsea, supra,* at 711. *Salvail* added "educational" considerations as an additional objective criteria. 469 F. Supp. at 1274. *See* Note, First Amendment Limitations on the Power of School Boards to Select and Remove High School Text and Library Books, *supra.*

Lastly, both *Right to Read* and *Salvail* attempt to narrow rather than completely challenge or disregard the Second Circuit's holding in *President's Council.* Both cases agree, as does *Minarcini,* that *President's Council* does not stand for the proposition that local officials have an absolute right to remove any books from the library without concern for the first amendment. Furthermore, *Salvail* observes that *President's Council* was decided prior to *Virginia State Board of Pharmacy* and implies that this Court's decision would be altered by the protection to the right of communication itself that is articulated in that case. The *Minarcini* court, in fact, relied heavily on that case. *See* Note, First Amendment Limitations on the Power of School Boards to Select and Remove High School Text and Library Books, *supra.* We respectfully suggest that in view of the conflict as to the scope of the Second Circuit's holding in *President's Council,* clarification as to its meaning and intent is necessary.

(D)

Finally, NYSUT offers a solution that should eliminate, to a great extent, the type of emotional issues and constitutional violations caused by the book banning actions under challenge in this action. In order to deal with the problem of library books that may become obsolete or

educationally unsound, the decision as to which, if any, books should be removed from a school library must be made by a standing committee of librarians, teachers, and school administrators. A book should only be removed after a finding by such a joint committee that the book is both educationally unsound and irrelevant. The criterion to be applied must be specific and must relate to the book's value and relevance as an instrument of educational development. Intrusion of the individual moral, religious, political or philosphical views of individual board members must be specifically proscribed. Censorship, in any form, or to any degree, must never enter into the decision making process. By following this suggested procedure local school officials would be removing the enormously dangerous threat of political and other subjective considerations that could be brought to bear on such decisions.

Moreover, the proceedings of the joint committee as reflected in its minutes of meetings, written recommendations and reports taken together with the actions of a school board with regard to the removal of a particular book or books, would provide a record of the removal process for a reviewing court. Where the recommendations of the joint committee are rejected by a school board under circumstances which indicate that moral and political considerations of individual board members are involved, the court should not hesitate to intervene. On the other hand, where the record demonstrates that educational or architectural considerations formed the basis for the removal decision, there would be no reason for a court to become involved. As a general rule, the decision of the school board, where not in conflict with the joint committee, should be presumed valid.

In the instant case, the Island Trees Board of Education appointed an eight member committee purportedly to review the books that it sought to remove and make recommendations to the board. [13] However, this Court should not be impressed by that procedure. First, the committee only had the power to recommend. The board retained the final authority to censor the books in question. Second, the board selected the members to serve on the committee and selected the books that it found to be objectionable (which books had been previously identified as "anti-Christian," "anti-Semitic," "anti-American" and "just plain filthy" by a "conservative" group).[14] Third, and perhaps most important, the board simply ignored the recommendations of its own committee and affirmed the removal of books that the committee had recommended the board to retain. The entire undertaking was a subterfuge, taken only after the board members had already decided that these books had to go. The odor of censorship permeated the entire process.

There are those who would suggest that a ruling by this Court in favor of the respondents would result in the filing of a federal lawsuit every time a book is removed from a library or a curriculum for any reason. That such is not the case is demonstrated in part by the paucity of cases on point. The "constant intrusion of the judiciary into internal affairs of the schools" predicted by the Second Circuit in *President's Council* simply has not materialized even in

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[13] Existing procedure called for the appointment of the entire committee by the Superintendent of Schools. Under the pretext that the procedure only applied in situations where the complaint was parent-initiated, the petitioners ignored the procedure.

[14] The Superintendent made a recommendation to the board that Mrs. Turin, District Chairman of Libraries, Mr. Brunnemer, High School Librarian, an English Department Head, and either Mr. Valenze or Mr. Carroll serve on the committee. Of the four recommended, only Mr. Carroll, a High School Principal, was appointed.

the two circuits where a more liberal interpretation of the first amendment prevails. *Id.* at 291-92.

This Court has cautioned that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). We are not asserting that "federal jurists mak[e] curriculum or library choices for the community of scholars," *President's Council, supra*, at 291-92, but merely that this Court provide guidance as to an appropriate and constitutional process for removal of books. With that in place, decision making on the issue could be returned to the local level.

Conclusion.

For the foregoing reasons, NYSUT respectfully requests that the judgment of the Second Circuit Court of Appeals reversing the district court's dismissal of the complaint and remanding the matter for trial, be affirmed.

Respectfully submitted,

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Office - Supreme Court, U.S.
FILED
JAN 4 1982
ALEXANDER L. STEVAS,
CLERK

No. 80-2043

IN THE

Supreme Court of the United States

October Term, 1981

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT No. 26; RICHARD AHRENS, FRANK MARTIN, CHRISTINA FASULO, PATRICK HUGHES, RICHARD MELCHERS, RICHARD MICHAELS, and LOUIS NESSIM,

Petitioners,

against

STEVEN A. PICO, by his next friend, FRANCES PICO; JACQUELINE GOLD, by her next friend, RONA GOLD; RUSSELL RIEGER, by his next friend, SAMUEL RIEGER; GLENN YARRIS, by his next friend, RICHARD YARRIS and PAUL SOCHINSKI, by his next friend, HENRY SOCHINSKI,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF P.E.N. AMERICAN CENTER, AS *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS

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No. 80-2043

In the
SUPREME COURT OF THE
UNITED STATES

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26, RICHARD AHRENS, FRANK MARTIN, CHRISTINA FASULO, PATRICK HUGHES, RICHARD MELCHERS, RICHARD MICHAELS, AND LOUIS NESSIM, Petitioners,

- against -

STEVEN A. PICO, by his next friend, FRANCES PICO, JACQUELINE GOLD, by her next friend, RONA GOLD, RUSSELL RIEGER, by his next friend, SAMUEL RIEGER, GLENN YARRIS, by his next friend, RICHARD YARRIS and PAUL SOCHINSKI, by his next friend, HENRY SOCHINSKI.

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF P.E.N. AMERICAN CENTER AS AMICUS CURIAE

This brief, Amicus Curiae, is submitted pursuant to Rule 36 of the Rules of this Court, urging affirmance of the decision below of the United States Court of Appeals for the Second Circuit, on the grounds that the actions of petitioners, the Board of Education of the Island Trees Union School District and its members (hereinafter "petitioners" or the "board"), violated the First Amendment to the United States Constitution.* Letters from the parties, consenting to the submission of this brief, have been filed with the Clerk of this Court.

*The decision of the Court of Appeals is reported at 638 F.2d 404.

INTERESTS OF THE AMICUS

Amicus, P.E.N. American Center ("P.E.N."), the United States chapter of International P.E.N., is a non-profit association of some 1800 leading American poets, playwrights, essayists, editors, novelists and translators. Its members include the authors of four of the nine books which, as described below and in the briefs of respondents and the supporting amici, were improperly removed from the shelves of a school library by petitioners.* P.E.N. is, of course, concerned by petitioners' improper suppression of books written by

* Bernard Malamud, author of The Fixer; Kurt Vonnegut, author of Slaughterhouse Five; Piri Thomas, author of Down These Mean Streets; and Alice Childress, author of A Hero Ain't Nothin' But A Sandwich, are all members of P.E.N. Mr. Malamud is P.E.N.'s immediate past President. Langston Hughes, the editor of a fifth book, Best Short Stories of Negro Writers, was a member of P.E.N. until his death in 1967.

its members.

But P.E.N.'s interest as amicus extends beyond its interest in remedying unwarranted suppression of its members' books. As an organization of writers, P.E.N. stands committed to the principle of free expression and communication of ideas and robust, open debate. As such, it is acutely sensitive to the evils inherent in allowing a government agency or official to judge and condemn a book because isolated excerpts might offend an official's sensibilities or might contain ideas contrary to his subjective philosophy; it is concerned with the use of governmental powers to block individuals from access to any ideas. No place are these dangers more threatening, or the need for independent inquiry and a diversity of views more compelling, than in an academic setting; free and open access to ideas and information

must be particularly encouraged in our public schools if today's students are to be educated to assume citizenship in our democratic society. Because of its position as an association of writers concerned with free expression, P.E.N. brings an important interest and viewpoint to bear on this dispute.

STATEMENT OF THE CASE

At the outset, it is worth noting what questions are not in issue here. This is not a case about who determines educational priorities in face of budgetary considerations; it is not a case involving the implementation of a consciously chosen educational philosophy to enrich the minds and intellect of students; it is not a case in which obscene material has been pandered to students in the guise of intellectual expansion.

This is a case that demonstrates the susceptibility of educational institutions, absent Constitutional protection, to hysterical fringe group politics.

This is a case in which "educators" claim the right to keep students ignorant and maintain that right as absolute.

This is a case in which some of the finest examples of modern literature have been stamped as inappropriate by governmental authorities because excerpts from those books offended the sensibilities or the political views of those authorities.

The facts of the case have been described in detail in the briefs of respondents and supporting amici, and in Judge Sifton's opinion for the court below. Amicus will not burden the Court with a repetition of these facts.

Amicus suggests, however, that any consideration of petitioners' actions must take into account the literature which is the essence of this controversy.

The books that the board removed from the school library are among the finest examples of modern literature. Naturally, Amicus is particularly concerned that books which

have received such uniformly high commendation can be so summarily blacklisted. The following are the books which the Board of Education, Island Trees Union Free School District has determined to be unfit for use in the education of its students:

FICTION

(a) The Fixer by Bernard Malamud, a P.E.N. member and past President. When it was published in 1967, The Fixer was awarded the Pulitzer Prize in Letters and The National Book Award. It was also placed on the American Library Association's Lists of Best Books for Young Adults and of Fiction for College Bound Students. It received favorable professional reviews and listings in the School Library Journal, Booklist, Library Journal, and Senior High School Library Catalog.

Following are excerpts from the Pulitzer Prize Jury for Fiction in 1967, awarding Bernard Malamud the Pulitzer Prize for fiction for The Fixer:

> "...The Jury recognized the fact that in an age notable for novels of self-pity, Mr. Malamud has taken the raw material of still another victim -- or an "anti-hero" -- and turned him into a heroic figure: 20th century and authentic.... With a kind of wry passion Malamud denies the modern paralyzing fear that personal goodness cannot survive the evil of history; and in doing so brings to the American novel a new and tough sense of possibility.
>
> Among other elements entering into this judgment, the Jury noted the literary skill of the novel, unobtrusive but present, as the story itself achieves the quite astonishing feat of beginning with despair and working through it to a climax of inward triumph and even a kind of ironical joy in life."

(b) Slaughterhouse Five by

Kurt Vonnegut, Jr., P.E.N. member. Shortly after its 1969 publication, Slaughterhouse Five was nominated for the National Book Award, was cited by the National Institute of Arts and Letters and received the Indiana Authors Day Award from the Indiana University Writers Conference. It was also listed on the American Library Association's 1975 List of Fifteen Years of Best Books for Young Adults. It received favorable professional reviews and listings in the School Library Journal, the Library Journal, and the Senior High School Library Catalog.

(c) A Hero Ain't Nothin' But A Sandwich by Alice Childress, P.E.N. member. When published in 1973, this book was nominated for the National Book Award in Children's Literature. It was listed on the American Library Association's List of Best Books for Young

Adults in 1973 and List of Fifteen Years of the Best Books for Young Adults in 1975. It was cited as one of the best books of the year by the School Library Journal.

The book won the Jane Addams Children's Book Award in 1974, an award sponsored jointly by the Jane Addams Peace Association and the United States Section of the Women's International League for Peace and Freedom. The award is made each year to "encourage publication of books for children which are of literary merit and contain constructive themes" and that "best promote peace, the dignity and equality of all peoples, and social justice." Literary and Library Prizes, 263 (R.R. Bowker, 9th ed. 1976).

The book also received the Woodward Park School Annual Book Award in 1974, given "for the book for

children which best demonstrates good human relations." Children's Books: Awards & Prizes 109 (Children's Book Council 1979).

The New York Times Book Review, November 4, 1973, called this book one of the outstanding books of the year in 1973, stating:

> "There are too few books that convince us that reading is one of the supreme gifts of being human. Alice Childress, in her short, brilliant study of a 13- year-old black heroin user, 'A Hero Ain't Nothin But a Sandwich,' achieves this feat in a masterly way by telling a real story of the victims of today's worst urban plague, heroin addiction, and it reaffirms the belief that excellent writing is alive and thriving in some black corners of America."

AUTOBIOGRARHIES

(d) Go Ask Alice. Go Ask

Alice is an anonymous work published in 1971. The book was listed by the American Library Association as one of the Best Books for Young Adults in 1972 and was listed on the 1975 List of Fifteen Years of Best Books for Young Adults. In addition, it received the Christopher Award in 1972 and the MAXI Award. It was elected one of the best books for Spring by the School Library Journal. It received favorable professional reviews and listings in Booklist and in Senior High School Library Catalog.

When reviewed in the November 11, 1971 edition of the Christian Science Monitor (page B, 6), it was recognized that this book's "subject is unpleasant, the language sometimes crude, the experiences often horrifying." The reviewer went on to state, however:

"And yet ... the book must be read. More than anything else, it was the lack of communication that 'Alice' felt between herself and the world of her parents, teachers, and friends, and her lack of knowledge about drugs, that proved fatal .... No one can afford not to take the drug culture seriously. And no one can read this book without aching to the waste of a compassionate and talented girl who never quite managed to escape the nightmare of drugs."

(e) Soul On Ice by Eldridge Cleaver. This book was critically acclaimed following its publication in 1968. Charlayne Hunter wrote in the March 24, 1968 edition of the New York Times Book Review that:

"'Soul on Ice' is not a book about the prison life of a black man, although a very good picture of prison life does emerge secondarily. The book is about the imprisonment of men's souls by society."

In his review in the Atlantic Monthly of June, 1968, Robert Coles wrote:

> "[Cleaver] has a sense of humor. He knows how to be astringent one minute, ironic the next. He can be tolerant and compassionate.... He is full of Christian care, Christian grief and disappointment, Christian resignation, Christian messianic toughness, and hope. He loves his lawyer, a white woman, and pours out his love to her in three beautiful, incredibly subtle and blunt and unsparing and unforgettable letters. How did he do it -- learn to write, learn the really impressive theological subtleties that are addressed to his lawyer? (They remind one of Dietrich Bonhoeffer in jail, or Dostoevsky writing from the Underground.)".

The work was awarded the Martin Luther King Memorial Prize in 1970, a prize awarded "for literary work reflecting the ideals to which Martin

Luther King dedicated his life."
Literary and Library Prizes, supra, at 414. It was also placed on the American Library Association List of Best Books for Young Adults in 1968 and the 1975 list of Fifteen Years of Best Books for Young Adults. It was favorably reviewed and listed in the School Library Journal, Booklist, Library Journal and Senior High School Library Catalog.

(f) Down These Mean Streets by Piri Thomas, P.E.N. member. Daniel Stern, reviewing Down These Mean Streets in the New York Times Book Review of May 21, 1967, describes the book as having

> "an undeniable power that I think comes from the fact that it is a report from the guts and heart of a submerged population group, itself submerged in the guts and hearts of our cities. It claims our attention and emotional response because of the honesty and pain of a life led

in outlaw, fringe status, where the dream is always to escape."

The book was cited by the American Library Association as one of the Best Books for Young Adults in 1967. It received favorable professional reviews and listings in the School Library Journal, The Library Journal and Booklist.

ANTHOLOGIES

(g) Best Short Stories BY NEGRO WRITERS, edited by Langston Hughes, P.E.N. member prior to his death in 1967. This work is a collection of 47 short stories by noted black writers including Ralph Ellison, Richard Wright, Frank Yerby, Jean Toomer, James Baldwin, Charles Chestnutt and Paul Dunbar. It received favorable professional reviews and listings in The School Library

Journal, Senior High School Library Catalog and Library Journal, which observed that "Mr. Hughes seems to have made his selections on the basis of literary style or merit." 92 Lib. J. 1760 (1967).

The editor, Langston Hughes, won a Guggenheim Fellowship in 1935, a National Institute of Arts and Letters Award in 1946, and in 1953 won the Anisfield-Wolf Award, an award given "to the best work concerned with racial problems in the field of creative literature." Literary and Library Prizes, supra, at 37-38. In 1960, he won the NAACP Spingarn Medal for literary achievement.

(h) A Reader For Writers, edited by Jerome Archer. This book is a collection of some 110 short stories or essays by noted writers including John Updike, Mark Van Doren, Arthur

Schlesinger, David Riesman, Samuel Johnson, Aldous Huxley, Robert Benchley, Francis Bacon, James Madison, Alexis de Tocqueville, Walter Lippmann, C.P. Snow, Thomas Jefferson, Jonathan Swift, Joseph Conrad, James Thurber, E.B. White, and Lionel Trilling. The editor, Jerome Archer, is Professor of English at Arizona University. This anthology was not reviewed or listed in the standard school and library media, apparently because the book was primarily distributed outside the high school market.

NON-FICTION

(i) The Naked Ape by Desmond Morris. This work received a favorable review and listing in the Library Journal of January 1, 1968. Another review in the April, 1968 edition of Choice Magazine (p.228) describes this

as "one of the better behavioral science books of the year.... Morris ... gives us a startling view of man, stripped of the facade we try so hard to hide behind."

SUMMARY OF ARGUMENT

The unique facts of this case present this Court with government censorship in blatant defiance of the First Amendment to the United States Constitution. At issue is a local school board's removal of serious literary works from school libraries without resort to evenhanded procedures or standards. The only proferred justifications for this action are that the works present philosophies differing from those held by the school board members and that they contain isolated passages which the board members deem offensive. The school board further responds that its status as a school board *ipse dixit* shields its actions from judicial scrutiny and applicable Constitutional standards.

Amicus respectfully submits

that petitioner's position is devoid of merit. It is precisely the business of the Courts to ensure that no governmental entity - school board or otherwise - acts in any way inconsistent with the First Amendment. As is argued in Point I below, recognition of a school board's need for discretion and independence in making educational and administrative determinations does not require blind deference to blatantly unconstitutional actions. Rather, the nature of the First Amendment interests must first be determined; only then can the needs of a school board be accomodated - and then only to the extent necessary.

As argued in Point II below, petitioners' actions in this case admittedly involve the suppression of ideas with which they disagree. This the First Amendment prohibits. By

purging a school library of works which they find inconsistent with personal philosophies, the school board created the very opposite of the marketplace of ideas the First Amendment protects.

In Point III below, Amicus argues that seizing upon isolated passages of serious, important texts and stamping them dirty or unfit for youth, without any consideration of their literary context or emotive content, flies in the face of cardinal principles of First Amendment law.

And doing all of this in the total absence of any articulated standard, solely on the basis of subjective taste, cannot be anything other than an absolute disregard of established First Amendment jurisprudence, as is argued in Point IV below.

For all of the foregoing reasons, and as demonstrated below,

Amicus respectfully submits that long-standing First Amendment principles and precedents require the affirmance of the decision below.

ARGUMENT

PETITIONER'S ACTIONS VIOLATE THE FIRST AMENDMENT

This case raises important First Amendment issues in the context of public education. Public schools have an essential mandate in training young adults for intelligent participation in our pluralistic, democratic society. To fulfill this goal, they are entrusted with the task of ensuring that students receive "wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

This case presents an attempt by members of a local school board to frustrate that principle. At issue are actions by school board officials which have at their source not the protection

of pupils, but rather the insulation of those pupils by narrowing the spectrum of ideas to which they can be exposed in a public school setting. This they accomplished by removing from the shelves of a school library serious literary works, fiction and non-fiction, which advance viewpoints and contain passages that those officials find inconsistent with their own personal and undeniably subjective philosophies.

It is not even seriously suggested that this removal was either accomplished under any particular specified procedure, or was the result of an even-handed application of uniform, educationally inspired principles.

Rather, petitioners attempt to justify their content-based removals by arguing (a) that their public office entitles them to remove books inconsis-

tent with their particular viewpoints, and (b) that isolated excerpts from these books, taken wholly out of context, contain offensive language. Petitioners' real argument appears in substance to be that simply because their actions are those of a school board some undefined and impenetrable shield protects them from review by this Court to redress these First Amendment violations.

As demonstrated below, and in the briefs submitted by respondents and supporting amici, the range of discretion permitted a school board, while perhaps broader than that of some other governmental entities, is nonetheless bounded by the principles of the First Amendment. Petitioners' actions here have overstepped those bounds.

I. Petitioner's Actions are Subject to First Amendment Limitations

Petitioners argue that, the First Amendment notwithstanding, the federal courts should not pass upon their "educational" decisions. Appellant's Brief at pp. 13-16, 22-24.

Amicus does not dispute the need for school officials to have considerable latitude in their determinations. Amicus respectfully suggests, however, that the First Amendment is not circumscribed by blind deference to school board decisions. Rather, the proper approach is to determine first what the First Amendment prescribes and only then -- and only to the extent necessary -- accomodate the admitted need for latitude in educational and administrative determinations.

It is a cardinal principle of First Amendment jurisprudence that the

government "must remain neutral in the market-place of ideas." F.C.C. v. Pacifica Foundation, 438 U.S. 726, 745-46 (1978). "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972). See also, Madison School District v. Wisconsin Employment Relations Commission, 429 U.S. 167 (1976).

As Justice Jackson, writing for the Court, observed in West Virginia State Board of Education v. Barnette:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion .... If there are any circumstances which permit an exception, they do not now occur to us." 319 U.S. 624, 642 (1943).

The locus of the instant controversy in the public schools does not inherently limit these First Amendment principles. To the contrary, this Court has repeatedly cautioned that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools," Shelton v. Tucker, 364 U.S. 479, 487 (1960) and has described "[t]he classroom as "peculiarly the 'marketplace of ideas.'" Keyishian v. Board of Regents, 385 U.S. 589,603 (1967).

As this Court has firmly established, school boards, like other governmental agencies, are subject to constraints imposed by the Constitution:

> "The Fourteenth Amendment ... protects the citizen against the State itself and all of its creatures - Boards of Education not excepted. These have, of course,

> important delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 637 (1943).

Although boards of education may have a considerable range of legitimate discretion, they do not have a roving commission to determine that only their own particular views are legitimate and that others are intolerable and to be excluded. To hold otherwise would allow school boards to "cast a pall of orthodoxy over the classroom" contrary to the mandates of a long and uncontradicted line of First Amendment cases in the public school context. Keyishian

v. Board of Regents, 385 U.S. 589, 603 (1967); see, e.g., Tinker v. Des Moines Independent School Community District, 393 U.S. 503 (1969); Epperson v. Arkansas, 393 U.S. 97 (1968); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); Meyer v. Nebraska, 262 U.S. 390 (1923). It against this standard that petitioner's actions must be judged.

II. Petitioners' Removal Of Serious Literary Works Because Of Ideological Condemnation Of Their Contents Violates The First Amendment.

Defendants have not disputed the fact that their removal of various of the books was based on disapproval of the ideas and values the books advance. The books first came to the board's attention as the result of a conference sponsored by an issue-oriented pressure

group, PONY-U, whose literature criticized one book as the work of a Black Panther, and condemned another for praising Malcolm X. Armed with a blacklist supplied by PONY-U, the board members scoured the school library to remove the books on the list, an action it subsequently defended in one press release on the grounds that some of the books were assertedly "anti-American", "anti-Christian", and "blasphemous." The board has since defended the exclusions on the grounds that the books contained material contrary to the board members' "conservative philosophy".

Petitioner's actions effect precisely what the First Amendment forbids: censorship of ideas via official condemnation. That this is the result of the petitioners' personal distaste for certain philosophies further exacerbates the First Amendment

offense.*

*This case is thus clearly distinguishable from F.C.C. V. Pacifica Foundation, supra, in which Justice Stevens made clear in his plurality opinion that "[i]f there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content ... First Amendment protection might be required." 438 U.S. at 476. In contrast, plaintiff's claim in this case is precisely that the books were removed because of disagreement with the viewpoints expressed. In addition, as Justice Stevens emphasized, the "narrow" decision in Pacifica hinged on the unique character of radio broadcasts, which (a) confront unwilling listeners "in the privacy of the home" (438 U.S. at 478), and (b) are accessible to very young children, "even those too young to read." (438 U.S. at 479). These factors are, of course, not present here. Finally, whatever value the George Carlin monologue, at issue in Pacifica, may have had in the exposition of ideas, there can be no dispute but that the books removed by the board in this case are serious works of literature and social commentary, whose primary focus is the exposition of ideas that go to the heart of the interests protected by the First Amendment. Compare Pacifica, 438 U.S. at 746 (Stevens, J.).

A. A School Board, Like Any Other Governmental Entity, May Not Officially suppress Ideas

Obviously, the content-based decision to remove "objectionable" books makes student access to them more difficult and indeed impossible through the school library (which of course remains open to books containing "approved" viewpoints).

But the removals also have an equally if not more significant symbolic impact: they communicate a clear message of official condemnation of the viewpoints suppressed. As Judge Newman observed in his concurrence below:

> "The symbolic effect of a school's action in removing a book solely because of its ideas will often be more significant than the resulting limitation upon access to it." 638 F.2d at 434.

This is because it:

> "signal[s] to the students and

> the teachers an official message that the ideas presented in those books are unacceptable, are wrong and should not be discussed or considered. The chilling effect of this message on those whou would express the idea is all too apparent."Id.*

Amicus recognizes that one function of education is to inculcate in youth certain basic values. The point, however, is that the inculcation of certain ideas does not justify the supression of others. As Judge

*We need not delineate here the circumstances in which First Amendment issues are raised by a decision to not acquire a given text, as distinguished from a removal of texts already acquired. We do note, however, that since all books cannot be acquired, acquisition decisions are likely to involve economic considerations not present in a decision to remove a book that is already on the shelves. In addition, non-acquisition does not generally operate to single out for official disapproval any particular text from the millions of texts not acquired. Accordingly, it would no doubt be only the very rare case in which an acquisition decision would convey a message of official condemnation of a viewpoint with the same clarity as does an official decision to remove a book from the library shelves.

Newman eloquently observed:

> "It is one thing to teach, to urge the correctness of a point of view. But it is quite another to take any action that condemns an idea, that places it beyond the pale of free discussion and scrutiny.
>
> * * *
>
> "Those in a school community have a right to be free not only from prohibition and unwarranted regulation of expression. They have a right to be free from official conduct that tends to suppress ideas -- conduct conveying the message that some idea or viewpoint is not merely unsound, but is not acceptable to be aired within the school community." Id. at 432-433, 433.

Simply stated, such symbolic official condemnation impermissibly compromises the government's constitutionally-mandated neutrality in the marketplace of ideas.*

*The fact that the board's actions fail
(footnote continued on next page)

*(footnote continued)
to effect a total ban is not constitutionally significant. This Court has recognized that a message of official condemnation short of a total ban can violate the First Amendment more subtly but just as surely as would a total ban. Thus, in Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963), the Court struck down a statutory scheme under which a state "Commission to Encourage Morality in Youth," inter alia, classified books as acceptable or "objectionable" pursuant to a statutory mandate to "educate the public concerning any book containing obscene, indecent, or impure language, or manifestly tending to the corruption of the youth as defined [by the statute]." 372 U.S. at 59-60. See also, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 n.8 (1975); Interstate Circuit v. Dallas, 390 U.S. 676 (1968). And once again quoting from Judge Newman's concurring opinion: "[t]he impact of burning a book does not depend on whether every copy is on the fire." 638 F.2d at 434.

B. Petitioners' Personal Predilictions Provide Insufficient Bases For The Actions Taken

The Constitution does not allow government officials to purge libraries any more than to purge movie screens or street corners of expressions inconsistent with their particular philosophies. The board members' disagreement with particular viewpoints is simply not a legitimate basis for their exclusion of a book. Having created a library, and indeed having already placed these books on the shelves, the board cannot then remove them because of "philosophical" objections to the viewpoints expressed.*

*In Minarcini v. Strongsville City School Dist., 541 F.2d 577, 582 (6th Cir. 1976) the court observed: "Neither the State of Ohio nor the Strongsville School Board was under any federal constitutional compulsion to provide a library for the Strongsville High School (footnote continued on next page)

Cf., Widmar v. Vincent, __ U.S. __ , 50 U.S.L.W. 4062 (Dec. 8, 1981).

As this court stated in Tinker v. Des Moines Independent School Community District, supra:

> "In our system, students may not be regarded as close-circuit recipients of only that which the state chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." 393 U.S. at 511.

Since the First Amendment does not protect the expression of only those views to which the board members adhere, the board's disapproval of particular ideas does not justify its exclusion of works containing them. Such exclusion

*(footnote continued)
or to choose any particular books. Once having created such a privilege for the benefit of its students, however, neither body could place conditions on the use of the library which were related solely to the social or political tastes of school board members."

is similar to the governmental action considered and rejected in Kingsley International Pictures Corp. v. Regents of the University of New York, 360 U.S. 684 (1959). In that case, the Motion Picture Division of the New York Education Department found isolated scenes of the movie "Lady Chatterley's Lover" to be "immoral", a finding that was subsequently upheld by the Regents of the University of the State of New York and by New York courts on the theory that the "picture as a whole 'alluringly portrays adultery as proper behavior.'" 360 U.S. at 687. This Court without dissent struck down New York's suppression of this "immoral" viewpoint as a violation of the First Amendment:

> "What New York has done ... is to prevent the exhibition of a motion picture because that picture advocates an idea

> -- that adultery ... may be proper behavior. Yet the First Amendment's basic guarantee is of freedom to advocate ideas. The State, quite simply, has thus struck at the very heart of constitutionaly protected liberty." 360 U.S. at 688-89.

To the same effect is the decision in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), holding that an official finding that a film was "sacrilegious" could not justify its suppression. As the Court there observed, "[i]t is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures." 343 U.S. at 505.

In sum, petitioners' actions, based upon their personal ideologies, and constituting government censorship, stand in stark defiance of established First Amendment law.*

*The Constitutional infirmities in the board's book removals are not cured simply because its "conservative philosophy" may be shared by a portion -- or even a majority -- of the local community. To quote again from the Court's opinion in West Virginia State Board of Education v. Barnette:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." 319 U.S. at 638.

III. Content-Based Removals of Serious Literary Works Cannot Be Justified on the Grounds That Isolated Excerpts, Taken Out of Context, Contain "Offensive" Language.

As noted above, petitioners also seek to justify their book removal on the ground that isolated excerpts taken out of context contain language objectionable to the board members. This "objectionable language" justification must be rejected for several reasons.

The board's focus on isolated passages flies in the face of the established principle of First Amendment jurisprudence that the protected character of expression is to be determined on the basis of the expression "taken as a whole", and not on the basis of isolated excerpts. Miller v. California, 413 U.S. 15, 24 (1973). If a "quotation from Voltaire

in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication", Kois v. Wisconsin, 408 U.S. 229, 231 (1972), then an isolated objectionable passage cannot condemn an otherwise protected piece of serious literature or social criticism. Defendants' theory that non-obscene, serious literature can be supressed because of isolated, objectionable passages does not have a shred of support in First Amendment jurisprudence.

An "isolated excerpts" standard -- even if implemented even-handedly by local boards -- would lead to the wholesale suppression of the Bible, Shakespeare and most other serious literature, along with the contemporary classics condemned here.*

*See FCC v. Pacifica Foundation, supra, 438 U.S. at 771, n.5. (Brennan, J. dissenting)

Amicus does not pretend that the works condemned by the board contain only words that might be spoken by a Mary Poppins or by a Rebecca of Sunnybrook Farm. They don't. But neither are the social milieus described in those books the same fairy tale worlds inhabited by those fictional characters. Books like Soul on Ice, The Fixer, and Down These Mean Streets describe tougher, less polite worlds and do so in tougher, less polite language.

This Court has recognized that the First Amendment protects not only the distilled cognitive content of expression but also the emotive form in which that content is cast. As Justice Harlan wrote for the Court in Cohen v. California:

> "[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function, which practically speaking, may often be the more important element of the overall message sought to be communicated." 403 U.S. 15, 26 (1971).

In Cohen v. California, this reasoning was applied to protect Mr. Cohen's wearing of a crudely defaced jacket; it must inevitably have much greater force in the context of serious social commentary and the "subtle shaping of thought which characterizes all artistic expression." Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952). Literature like that sup-

pressed here is, of course, much more than the sum of its ideas: it is an alchemy from which form and content cannot be neatly separated without losing a total effect. As the court recognized in United States v. One Book Called "Ulysses", 5 F.Supp. 182, 184 (S.D.N.Y. 1933), aff'd, 72 F.2d 705 (2d Cir. 1934), even though a serious literary work may be "disgusting" in places and may contain "many words usually considered dirty," nonetheless: "[e]ach word of [a] book contributes like a bit of mosaic to the picture which [the author] is seeking to construct for his readers."

Moreover, as this Court observed in Cohen, there are some ideas that are inevitably expressed, and perhaps only expressible, in language that some may find offensive:

> "... [W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results." 403 U.S. at 26.

This teaching -- that particular language cannot be suppressed without risking the suppression of serious ideas -- is especially apt with respect to the books condemned by the school board here. Excerpts from Soul on Ice by Eldridge Cleaver, the former Minister of Information of the Black Panther party, may be inevitably "offensive" to some. See, Brown v. Oklahoma, 408 U.S. 914 (1972) (Powell, J. concurring) (observing that "it might well have been

anticipated" that the language of a speaker presenting "the Black Panther viewpoint" would offend some listeners). The same may be true of the descriptions of ghetto life in a book like Down These Mean Streets or the story of anti-semitism in tsarist Russia in The Fixer. But if these books contain isolated offensive passages, it is because the realities they describe contain at least isolated offensive incidents; suppression of the books because of offensive passages would inevitably suppress the full force of the ideas and messages they convey,* which as argued above, is itself unconstitutional.

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* Judge Newman seemed to recognize the possibility that this justification is but pretense when he wrote:

> "the bona fides of a school's claim of concern with vulgarity or sexual

(footnote continued on next page)

IV. Petitioners' Content-Based Removals Were Based On Non-Existent Standards

The gravity and danger of the removal of books in situations like that presented here is exacerbated by the fact that the removal here was not made in reliance on <u>any</u> standard other than the degree to which books' viewpoints and language coincided or clashed with the board members' social philosophies and notions of good taste. The sole criteria for judgment were the personal

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*(footnote continued)
explicitness may be refuted by evidence that other books with similar passages were not removed. A school's effort to regulate vulgarity is not unconstitutional because it is not completely thorough, but if only isolated examples are condemned, the inference will be strengthened that vulgarity was the excuse, not the reason, for book removal whose principal, or at least partial motivation was political." 638 F.2d at 437.

views, reactions, and biases of the board members. Such unbounded, standardless discretion could lead to equally unbounded and discriminatory exclusion of views.

This Court has been vigilant in protecting expression from restrictions even when based on codified but "vague" standards. For example, in Interstate Circuit v. City of Dallas, 390 U.S. 676 (1968), the Court struck down as unconstitutionally vague a city ordinance that required a license for the showing of films found by a Motion Picture Classification Board to be "unsuitable for young persons," a phrase which was defined at some length in the ordinance. See also, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

The board's ad hoc action here, however, was not even bounded by standards such as rigorous as those

found too loose in Interstate Circuit, supra; it was bounded by no pre-existing standard at all. In these circumstances the board -- like the censor under the New York statute considered in Joseph Burstyn, Inc., supra -- is "set adrift...amid a myriad of conflicting currents of religious [and philosophical] views with no charts but those provided by the most vocal and powerful orthodoxies." Joseph Burstyn, supra, 343 U.S. at 504-05.

A grave danger in any judicial endorsement of the board's action here is that it would operate as an invitation to such "vocal and powerful orthodoxies" (like PONY-U, whose "conference" inspired the board's action here) to promulgate blacklists and bombard school boards with vociferous demands that libraries be cleansed of books espousing views not in harmony

with their own. We submit that to allow curriculum and library removal decisions to be subject to such pressure is to pave the way for the disruption of public education and the destruction of the classroom as the "market-place of ideas."

We further submit that the possibility of occasional judicial review in those rare situations where a book has been removed in condemnation of its ideas is not the real threat to the orderly operation of school boards in situations analogous to the case at bar; that threat lies instead in the spectre of persistent pressures to narrow debate and to prune library shelves to suit the demands of "vocal and powerful orthodoxies." To paraphrase Judge Mansfield, dissenting below (638 F.2d at 425), if each pressure group were free to insist that library books be removed

to suit its views, chaos would ensue. Since the essence of education lies in the robust exchange of competing ideas, this Court should not sanction the suppression of books expressing viewpoints or containing messages disapproved of by a pressure group or a pressured school board.

CONCLUSION

For the foregoing reasons, and those stated by respondents and supporting amici, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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